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R E P O R T S
OF
C A S E S
ARGUED AND DETERMINED
IN
The Court of King's Bench.
VOL. I.



REPORTS

OF

CASES

ARGUED AND DETERMINED

6th Ed. IN
The Court of King's Bench,

WITH TABLES OF THE NAMES OF THE CASES
AND THE PRINCIPAL MATTERS.

BY

RICHARD VAUGHAN BARNEWALL, OF LINCOLN'S INN,

AND

EDWARD HALL ALDERSON, OF THE INNER TEMPLE, ESQRS.
BARRISTERS AT LAW.

VOL. I.

Containing the Cases of MICHAELMAS, HILARY, EASTER, and TRINITY
Terms, in the 58th Year of GEORGE III. 1817, 1818.

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J U D G E S
OF THE
COURT OF KING'S BENCH,

During the Period of these REPORTS.

EDWARD LORD ELLENBOROUGH, C. J.

SIR JOHN BAYLEY, Knt.

SIR CHARLES ABBOTT, Knt.

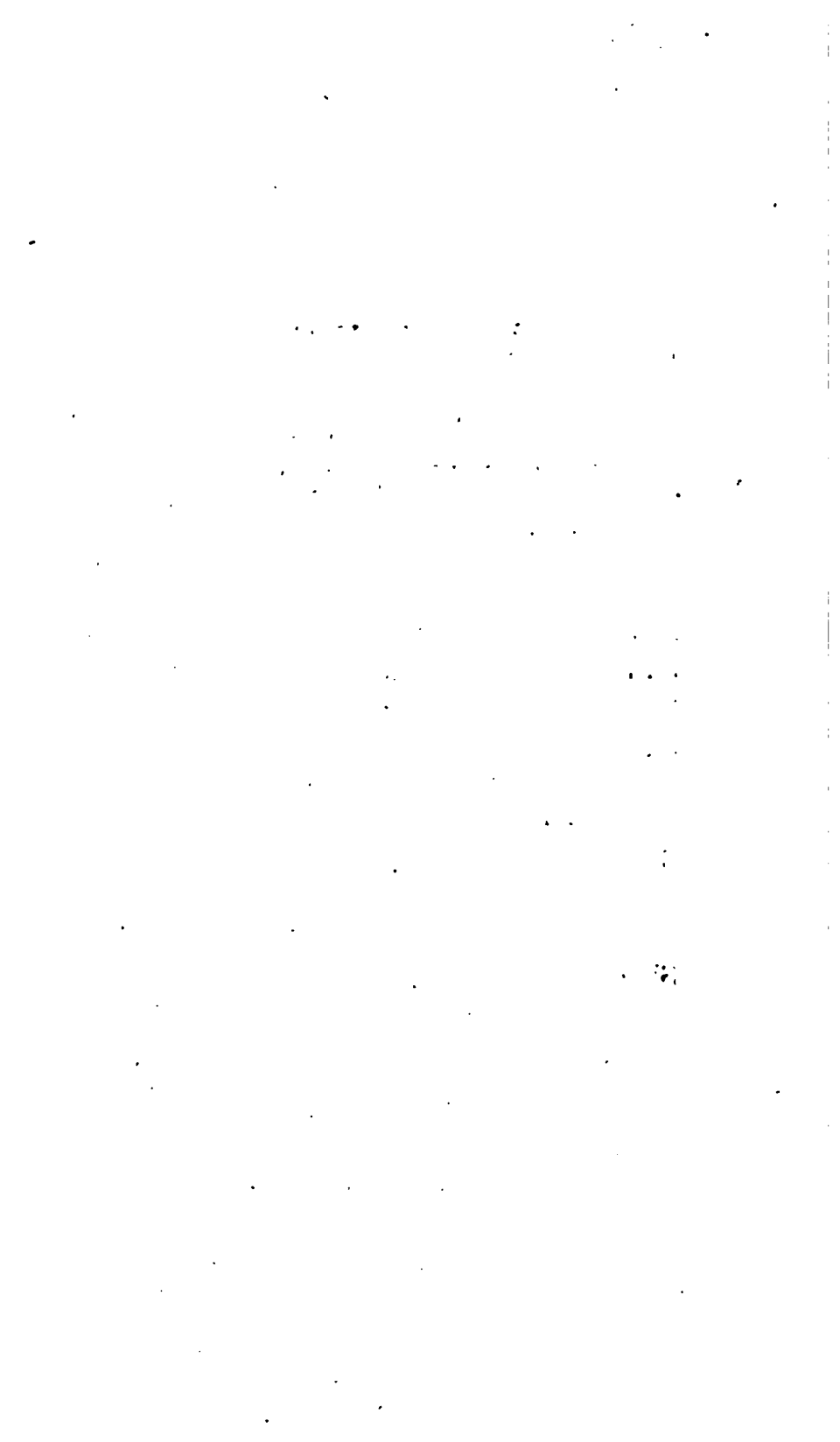
SIR GEORGE SOWLEY HOLROYD, Knt.

ATTORNEY-GENERAL.

SIR SAMUEL SHEPHERD.

SOLICITOR-GENERAL.

SIR ROBERT GIFFORD.



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ERRATA.

- Page 13. l. 1. *for plaintiff, read plaintiff.*
 16. l. 20. and 17. l. 5. *for plaintiff, read defendant.*
 22. *in the marginal note, l. 7. for certificate, read certificate.*
 63. last line but one, *for on, read an.*
 131. l. 13. and 14. *for and paying the condemnation-money or render-
 ing, read to pay the condemnation or render.*
 134. 2d paragraph, l. 2. *for York, read Lancaster.*
 146. l. 1. *for debt, read action.*
 166. in marginal note, *for 44 Geo. 3. read 42 Geo. 3.*
 l. 2. *for penalties, read duties.*
 170. l. 5. after the word "charged," add these words, "under the
 48 G. 3. c. 92. s. 8."
 last line but three, *for seventeen, read eighteen.*

C A S E S

ARGUED AND DETERMINED

1817.

IN THE

Court of KING's BENCH,

IN

Michaelmas Term,

In the Fifty-eighth Year of the Reign of GEORGE III.

THOMAS and Another *against* COURTNEY. (a)

Thursday,
Nov. 6th.

ASSUMPSIT on a guarantee, dated the 13th day
July 1814, whereby the defendant guaranteed to
the plaintiffs the payment of goods to be sold by them
to Messrs. *Baker* and Son, to the amount of 150*l.*, at
twelve months' credit.

The creditors
of an insolvent
agreed, by an
instrument,
(not under
seal,) that they
would accept
in full satisfac-
tion of their
debts twelve

shillings in the pound, payable by instalments, and would release him from all demands; one of the creditors, who signed for the whole amount of his debt, held at the time, as a security for part, a bill of exchange drawn by the debtor and accepted by a third person; the money due on this bill having afterwards been paid by the acceptor, it was holden that the creditor might retain it, the agreement of composition not containing any stipulation for giving up securities, and the effect of it not being to extinguish the original debt.

(a) The Judges of this Court sat at *Serjeants' Inn* on *Monday* the 27th of *October*, and on the succeeding days, until the term, and heard this and several of the following cases argued by counsel, and delivered their opinions as upon former occasions, (see 1 *M. & S.* 304., 2 *M. & S.* 1.); and the Court afterwards gave judgment on the day on which the cases are now reported.

VOL. I.

B

At

1817.

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 against
 COURTNEY.

At the trial before Lord *Ellenborough* C. J., at the *London* sittings after last *Hilary* term, it appeared that goods to the amount mentioned in the guarantee had been supplied by plaintiffs to *Baker* and Son; but the defence was that the plaintiffs, (with the exception of a small sum) had been paid by *Baker* and Son, under the following circumstances. On the 2d *March* 1814, the plaintiffs, together with the other creditors of *Baker* and Son, signed an agreement (not under seal) to accept, in full satisfaction of their debts, a composition of twelve shillings in the pound, to be paid by the promissory notes of *Baker* and Son, at six, twelve, fifteen, and eighteen months; and under this agreement, the plaintiffs, with two other creditors, were appointed to inspect their books, accounts, &c., to receive all monies, and out of such monies to provide for the payment of the promissory notes. The concluding clause was as follows: "And they the said creditors shall and will accept the sums secured by such promissory notes in full of all the debts due to them from *Baker* and Son, and release them from all actions and demands from the beginning of the world to the said 31st day of *December* last past." This agreement did not contain any stipulation for giving up securities. On the 31st *December* 1813, (the day mentioned in the agreement), *Baker* and Son owed the plaintiffs 1295*l.* which sum was written opposite their names at the time they signed their agreement, and for which they received promissory notes at the rate of twelve shillings in the pound, which notes were ultimately paid. In the preceding *November*, the plaintiffs had received from *Baker* and Son a bill of exchange, drawn by them, for 200*l.*, and accepted by a Colonel *Gower*. This bill

had

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 against
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had become due and was dishonoured, prior to the 31st December 1813, and then and at the date of the agreement remained in the hands of the plaintiffs; but in Feb. 1815, the money due on this bill was received by the plaintiffs from Col. Gower, and an allowance was made by them in their account, to that amount. It was admitted that if the money received by the plaintiffs on Colonel Gower's bill was to be considered as money had and received by them to the use of Baker and Son, it would go in payment of the goods sold under the guarantee, and the plaintiffs would not be entitled to recover beyond the smaller sum; but that if the plaintiffs, notwithstanding the agreement, were entitled to retain in their hands the produce of the bill, in satisfaction of the old debt due from Baker and Son, then a farther sum would remain due from the defendant upon the guarantee. Lord Ellenborough C. J. directed the jury to find a verdict for the smaller sum, with liberty to move. Accordingly, Scarlett, in Easter term last, moved to increase the verdict, and cited *Carstairs v. Rolleston (a)*. A rule nisi was granted; against which

Marryat and Barnwall now shewed cause, and contended that if the plaintiffs could have the benefit of twenty shillings in the pound, in consideration of Colonel Gower's bill, they would thereby obtain a preference over the other creditors. But independently of that, where a party agrees in common with other creditors, to accept a certain sum in full satisfaction of his demand, if he holds a security he must be considered as holding it for the benefit of the insolvent.

(a) 5 Taunt. 551.

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against
COURTNEY.

It is of the very nature of an agreement of this kind, that if there be a surplus, it shall result for the benefit of the insolvent. It is not like a discharge under bankruptcy, where a man has his certificate and only a statutable allowance. It may be admitted that a release to the drawer of a bill will not release the acceptor; but here after the composition, the original debt due from *Baker and Son* was no longer in existence, for the release operated as an extinguishment of it. In *Cockshott v. Bennet*, (a) *Ashhurst J.* says, "The debt was annihilated by the deed of composition;" and then the money received upon the bill would be so much money received for the use of *Baker and Son*. It may be questionable, whether any agreement for retaining the securities between *Baker and Son* and the Plaintiffs unknown to the other creditors could be supported. Upon the principle of *Cockshott v. Bennet* it could not; and if not, then the Court will not imply any such agreement. And they relied on *Stock v. Mawson*. (b)

Scarlett and Campbell contra. The case of *Stock v. Mawson* is distinguishable; for that proceeded upon the ground that the securities were to be given up. There the deed after releasing *Stock* contained a clause for relinquishing and giving up to him, "all bonds, bills, and other securities." This agreement does not contain any stipulation that any security shall be given up. It is a fallacy then to treat this bill as constituting part of the effects of *Baker and Son*: it was the property of the holder. And indeed *Baker and Son* never have demanded the bill; but this claim is

(a) 2 T. R. 766

(b) 1 Bos. & Pull. 286.

set up by the guarantee. The case might have been different if, as in *Stock v. Manson*, there had been a specific contract; for then, according to the authority of that case, the parties would have been bound by their agreement.

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LORD ELLENBOROUGH C.J. My mind has at last attained that conviction, which an imperfect view of this case alone prevented it from attaining before. The manifest intention of the agreement between these parties was, that the Plaintiffs were to receive twelve shillings in the pound on the amount of their debt. The first question is, What was that debt? Originally, and before it was reduced by the payment of Colonel Gower's bill, it amounted to 1295*l*. That bill was not productive at first; but as soon as the money due upon it was received, it had the effect of striking out 200*l*. from the amount of the debt, and thereby reduced it to 1095*l*. On that sum twelve shillings in the pound was to be received and no more. It is clear, then, that the Plaintiffs would have been overpaid if they had retained the twelve shillings in the pound upon the whole of the debt as it stood originally. But it appears, that as far as respects the 200*l*. an allowance has been made by them for that sum in their account. The case therefore stands as if the debt had originally amounted only to 1095*l*. The only question then is, have the Plaintiffs received more than twelve shillings in the pound upon that sum? It appears clearly they have not.

BAYLEY J. I am entirely of the same opinion. The fair meaning of such an agreement as this is, that

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 against
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Baker and Son should not be forced to pay more than twelve shillings in the pound on the amount of their debts to the different persons who signed the agreement. If it could have been made out that Colonel *Gower* had a remedy over against *Baker* and Son, that might have varied the case and brought it within the range of *Stock v. Mawson*. The principle of that case was, that if *Mawson* had been suffered to retain in his possession the money which he had raised on the bills given by *Stock*, he would have got more than eight shillings in the pound out of *Stock's* effects, by the amount of those bills which under the agreement *Mawson* was to restore and to give up to *Stock*. That was the plain principle on which that case proceeded. But there is nothing in the present agreement from the beginning to the end which stipulates for the relinquishing and giving up of any security. The only meaning of these parties was, that *Baker* and Son should not be bound to pay more than twelve shillings in the pound on any one pound of the debt to any of the creditors. The debt was originally 1295*l.* for 200*l.* of which the plaintiff held a security, but no security for the remainder. If Colonel *Gower's* bill had been an available security when the agreement was signed, it would have struck out two hundred entire pounds from the amount of the debt at that time. But it was then uncertain whether any thing would be recovered upon it or not, and therefore the plaintiffs claimed for 1295*l.* By reason of subsequent events, they do get from another quarter twenty shillings in the pound on the two hundred pounds, which leaves the debt as if it had originally been 1095*l.*, and on that sum only have the plaintiffs received twelve shillings in the pound. It

appears to me, therefore, that they have a full right to retain the twenty shillings in the pound upon the original security.

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against
COURTNEY.

ABBOTT J. The question turns on the meaning and effect of the written instrument which now lies before me. It appears that *Baker and Son* agreed with certain persons to be discharged from their debts on payment of twelve shillings in the pound secured by their promissory notes, and the agreement contains a provision for certain inspectors who were to receive the monies and to manage the trust. There is not in this written instrument any express reservation of securities; nor is there in this, as there was in *Stook v. Mawson*, any express declaration that the securities should be assigned over. But it has been contended that the Court must understand a virtual assignment to *Baker and Son* of all the securities which any of the creditors might hold at the time when the agreement was signed, and it is said, that if this construction is not put on the instrument, one creditor may obtain more than another. I cannot, however, say that it was the clear intention of these parties that all the creditors were to receive equally. It is clear that they were not to receive from *Baker and Son* more than twelve shillings in the pound. I cannot say that it was the intention that any one of the creditors holding a security, which might turn out to be an available security, should give it up for the benefit of *Baker and Son*, or their creditors. I rather think if such had been the intention of the parties, they would have framed the agreement accordingly. But not having done so, I think the plaintiffs are entitled to the benefit of the security which they held.

1817.

THOMAS
against
COURTHAY.

HOLROYD J. By this agreement it is not expressed that any security which a creditor holds for part of his debt shall be given up. There being no such express agreement, the question is, whether from what is stipulated we can infer that such was the intention of the parties. It is stipulated that the creditors shall receive the promissory notes of *Baker* and Son in full satisfaction of their debts, and shall and will release them from all the debts; but this stipulation by no means implies that the creditors were to give up such securities as they might hold at the time of the agreement. The only question then is, whether this agreement amounted to an extinguishment of the debt due from *Baker* and Son. In the first place, it may be remarked that the instrument is not in its terms an actual release; for it is not immediate, but prospective only, the language being that the creditors "*shall and will* release *Baker* and Son." Would it then operate as a release in law? Now a covenant not to sue will amount to a release only to the party with whom it is made, but will not operate as a discharge to other persons who may be jointly liable; but this agreement is not under seal: how then could it operate as a release? There being then no express stipulation for giving up securities, and nothing whence such a stipulation can be implied, and the effect of the agreement not being to extinguish the debt; I think the creditors were entitled to hold their securities, and consequently that the plaintiffs are entitled to retain the eight shillings beyond the twelve shillings upon the amount of their security.

Rule absolute.

1817.

WILDMAN against GLOSSOP. (a)

DECLARATION that plaintiff was possessed of a large quantity of head-matter and sperm oil, and that he bargained with the defendant to sell to him, and the defendant agreed to buy of plaintiff all the said head-matter and sperm oil at a certain rate or price, to wit, the rate or price of 69*l.* 18*s.* 9*d.* per ton, to be taken away by the defendant in fourteen days then next following, and paid for by his acceptance at four months; and in consideration thereof and also in consideration that plaintiff had promised the defendant to permit him to take away the said head-matter and sperm oil, defendant promised the plaintiff to take away the said head-matter and sperm oil in the time aforesaid, and to pay him for the same at the rate and in manner aforesaid. And the plaintiff further saith that afterwards, to wit, on &c. the quantity of the said head-matter and sperm oil so purchased by the defendant as aforesaid was found to be, and was a certain large quantity, to wit, three hundred and fifteen tons and one hundred and twenty two gallons, and that the price thereof at and after the rate aforesaid amounted to a large sum of money, to wit, the sum of 22,064*l.* 2*s.* 4*d.* Averment that plaintiff was, from the time of the sale and promise of plaintiff until and at the end of the fourteen days which have long since expired, ready and willing to permit and would have permitted defendant to take away the said head-matter and sperm oil. Breach, That defendant did not nor would in the said fourteen days or at any time after-

Where the contract declared upon was, that plaintiff had bargained and sold, and defendant agreed to buy a large quantity of head-matter and sperm oil, which was afterwards ascertained to be a given quantity, and the contract proved was, for the purchase of all the head-matter and sperm oil, *per the Wildman*: Held that this was no variance.

(a) Cause was shewn at *Serjeants' Inn*.

1817.

WILDMAN
against
GLOSSOP.

wards take away the said head-matter and sperm oil, nor did nor would pay for the same, by means whereof plaintiff not only lost great gains which would have arisen from the performance by the defendant of his promise, but also thereby he the plaintiff was obliged to and did necessarily sell the said head-matter and sperm oil for a much less sum of money than 22,064*l.* 2*s.* 4*d.* to wit, for the sum of 19,700*l.* only, and plaintiff hath by means of the premises been put to great charges for wharfage of the said head-matter and sperm oil, and about the selling of the same. The second count stated that plaintiff was possessed of a *certain* other large quantity of head-matter and sperm oil, that he bargained with the defendant to sell him all the said last mentioned head-matter and sperm oil at 69*l.* 8*s.* 9*d.* per ton to be taken away by defendant in 14 days and paid for by his acceptance at four months, &c. as in the first count. There were other counts for goods bargained and sold, and goods sold and delivered, and the usual money counts. Plea, non assumpsit. At the trial before Lord *Ellenborough* C. J. at the *London* sittings after last *Hilary* term, the plaintiff proved his case, except that the contract of sale given in evidence was, "for all the head-matter and spermaceti oil *per the Wildman*," whereupon it was objected that this was a variance, the contract stated being for oil generally, and that proved for oil by a particular ship; but Lord *Ellenborough* C. J. overruled the objection, and a verdict was found for the plaintiff. *Taddy*, in *Easter* term, obtained a rule nisi for a new trial; against which

Scarlett now shewed cause, and contended that there was not any variance; that the contract stated in the
declar-

declaration was proved with something additional, which neither qualified or altered it, viz. that the oil purchased was oil by a ship called the *Wildman*, which was perfectly consistent with the contract declared on; and he cited *Cotterill v. Cuff* (a), where the declaration stated that in consideration that defendant had agreed to buy certain bacon, defendant undertook that it was prime bacon: the contract proved was prime *singed* bacon; and it was insisted that that was a variance, it being an essential ingredient of the contract that the bacon should be *singed*; but the Court held it sufficient to state so much of the contract as related to the point of which plaintiff complained. In *Gladstone v. Neale* (b), the contract stated in the declaration was for a large quantity, to wit, eight tons of hemp; the terms of the contract proved was for about eight tons: this was held to be no variance, the quantity having been ascertained before action brought to be eight tons; and *Le Blanc J.* there suggests, as a more correct mode of declaring, the very form adopted in this case.

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Taddy contra. By the terms of this contract, the defendant was not bound to take any oil except such as came by the *Wildman*; but according to the contract stated in the declaration, he is called upon to accept any oil belonging to the plaintiff. The declaration does not in the commencement state any definite quantity as in *Cotterill v. Cuff* and *Gladstone v. Neale*, but afterwards says, that the quantity was found to be two hundred and eighteen tons; but it does not shew that that quantity was per *Wildman*; and that description may have been used by the parties to denote a particular quality of oil expected by that

(a) 4 Taut. 285.

(b) 13 East, 410.

ship,

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ship, or as a specific mode of measuring the quantity, that is, so much as the *Wildman* was capable of containing or actually brought; taking it in either sense it was an essential part of the contract.

LORD ELLENBOROUGH C. J. My opinion is confirmed by reflection and looking at the authorities. The party was in a condition to perform the contract at the time when it was made, and when the article was to be delivered. The objection is not an objection on the ground of a variance, because there is no contrariety between the statement and proof; the only question is, whether the statement in the declaration is sufficient. This appears to me to be an objection (if any) on demurrer, and not at *nisi prius*. The word *certain* has been too narrowly construed; it may either mean a definite or indefinite quantity. If the declaration had been in Latin, and the word *quandam* had been used, there would have been no objection. The word *certain* must in a variety of cases refer to an indefinite quantity at the time of the contract made, and must mean a quantity which is to be ascertained according to the maxim, *Id certum est quod certum reddi potest*. According to the argument, a count for use and occupation of certain premises without further description, as *Boreham* meadow, would be bad.

BAYLEY J. I am clearly of opinion that there is no variance between the allegation and the proof. Every allegation in the declaration is proved. It does not appear that there is any qualification or condition attached to the contract by the evidence. The declaration states, the Defendant to be possessed of a certain quantity of head-matter and sperm oil; that is proved.

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The declaration then states, that plaintiff sold to defendant all the said head-matter or sperm oil at a certain rate or price; that is proved. It then states that the quantity purchased by Defendant was found to be a certain large quantity, viz. two hundred and fifteen tons and so many gallons; that also is proved. The defendant must contend that a certain quantity must of necessity mean more or less than that contained in the *Wildman*. If it can be confined to the quantity contained in the *Wildman*, it will do. I think therefore there is no ground for this objection.

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ABBOTT J. I am of opinion that the declaration was supported by the evidence. The declaration states that plaintiff was possessed of a large quantity of head matter and sperm oil, and that he bargained with defendant to sell to him all the said head-matter and sperm oil at a certain price, to be taken away by Defendant in fourteen days, and paid for by his acceptance at four months, &c. and the question is, whether these allegations were proved. It was not necessary that the plaintiff should define the place where the oil was at the time of the contract. The objection, if any, should have been taken either on demurrer or in arrest of judgment. The only question that could arise at nisi prius was whether the declaration was well proved. The Plaintiff has proved all that the declaration alleges, and more; namely, that it was oil by the *Wildman*. Now whether this was oil which at the time of the contract was on board the *Wildman*, or had been previously imported, I do not know. But the objection to the declaration, if material, ought to have been raised in a different way, and cannot be considered as a variance,
in-

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against
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inasmuch as the term in the contract not stated in the declaration, does not qualify or annex any condition to, that which is stated.

HOLROYD J. concurred.

Rule discharged.

Thursday,
Nov. 6th.

SEYMOUR against PYCHLAU. (a).

A., a foreign merchant, employs *B.* to purchase goods on commission; the vendors (with the knowledge that the purchases were made on account of *A.*) make out the invoices to *B.*, and take in payment his acceptances, payable at six months: Held, first, that there was no contract of sale as between *A.* and *B.*; and, 2d, if any such contract existed, that *B.* could maintain no action against *A.* before the six months expired.

ACTION for goods sold and delivered. At the trial before Lord *Ellenborough* C. J. at the *London* sittings after *Hilary* term, it appeared that the defendant, a foreigner, came to *England* in 1815, recommended to the plaintiff, whom he directed to purchase for him a large quantity of goods to be afterwards exported on the defendant's account; upon these purchases the plaintiff was to have a commission. The invoices were all made out in the plaintiff's name, and he also gave to the vendor his acceptances payable in six months for the amount of the goods purchased. At the time of the purchase the vendor of the goods knew that they were purchased on account of the defendant. Before any of these acceptances became due the plaintiff commenced the present action, pending which he became bankrupt. His assignees continued to sue in his name, the defendant having been held to bail. Lord *Ellenborough* C. J. was of opinion that the plaintiff was a mere agent of the defendant, and that the facts furnished no evidence of a contract of sale as between them; and the plaintiff was nonsuited. *Gurney*, in *Easter* term, obtained a rule nisi for setting aside the nonsuit; and

(a) Cause was shown at *Serjeants' Inn*.

Scarlett

Scarlett (*Richardson* was with him) now shewed cause, and contended, that there was no evidence of the parties in this cause standing in the relation of vendor and vendee, but that the fact of the plaintiff's having contracted for a commission on the purchases, was decisive, to shew that in this transaction, as far as the defendant was concerned, the plaintiff was a mere agent: the commission was the price he was to be paid for his agency. The original sellers might have sued the defendant for the price of the goods, if they had not made their election to give credit to the plaintiff: by that act they have discharged the defendant from any claim on their part; but it was not competent to them, by any act of theirs, to alter the relation of these parties. The plaintiff made the purchases as the agent of the defendant; and there is no evidence whatever of any contract of sale as between them. Secondly, But assuming that it were otherwise, still, as there is no evidence of the defendant's having agreed to pay immediately, he must be taken to have agreed to pay on the term of the original purchase, *i. e.* by bill at six months, and then the action was commenced too soon.

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 SEYMOUR
 against
 PYCHLAU.

Gurney, Lawes, and Fuller, contra. The cases of *Patterson v. Gandasequi* (a) and *Addison v. Same* (b), are decisive to shew that where the original seller, knowing the *principal*, elects to give credit to the *agent*, he cannot, after such election, sue the principal. The original seller in this case, with a full knowledge that *Pychlau* was the principal, gave credit to *Seymour*, and thereby discharged *Pychlau* from any claim on their part: the goods then became the property of *Seymour* on

(a) 15 East, 61.

(b) 4 Taunt. 574.

their

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SKYMOUR
against
PYCHLAU.

their delivery to him; he ships them on account of the defendant. Did he intend them as a gift? The evidence affords no such inference; and if so, upon what terms were they delivered to the defendant? Solely on the expectation of being paid their value: or in other words on a contract of sale; and nothing being said as to credit, and there being no specific usage of trade on the subject, they must be taken as sold at a ready money price.

Lord ELLENBOROUGH C. J. To entitle the Plaintiff to recover, he must establish two points; first, that there was a contract of buying and selling, and that the relation of buyer and seller subsisted between him and the defendant; and secondly, that such contract was for a present price demandable instant: I think the plaintiff has failed in both points. There is not one feature in the case to shew that the plaintiff was to buy in order to assume the character of seller to the defendant; the relation between the parties is this: the plaintiff coming from Russia, wants the accommodation of a person in this country to become responsible for him; the defendant is to pay to the plaintiff a commission for the service done; when a person pays another commission, such other person stands in the relation of factor or agent, but this commission is to be paid when he has performed the duty: what is the duty? to pay for the goods; then if the defendant is now liable to the plaintiff for the debt, he does not derive the benefit intended to be earned by the payment of commission. Upon the latter point, there is not any pretence for saying that the price is demandable instant. Let us look at the reason of

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the thing; the defendant wants credit, and yet he is called upon to pay his agent immediately. The plaintiff was to pay by a bill at six months; when he has paid that bill, then he may sue the defendant, and not before. If it were otherwise, the plaintiff would be placed in a worse situation with respect to his agent, than he would with respect to the seller. I think therefore that as there was not in this case any thing to import a contract of buying and selling, and as immediate payment was contrary to the nature of the thing and the expediency of the parties, and as there was not any express stipulation to that effect, the plaintiff has failed in both points.

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D. J. L.

BAXLEY J. I think the nonsuit was right on both grounds. If it were otherwise, great injustice would result in this particular case; inasmuch as this action being brought for the benefit of the assignees of *Seymour*, the money when recovered will form a fund for the general creditors, and not for the benefit of the sellers of the goods. The real and true character of these parties was this: the defendant was to be the purchaser, the plaintiff the mere agent in the procuring of the goods, pledging his credit not generally as broker, but in a special way, viz. by guaranteeing, by his acceptances, the payment of the goods. That distinguishes this from *Patterson v. Gandasequi* and *Addison v. Gandasequi*. In those cases the seller had an option to look either to the middle man or to the principal; they thought it best to look to the middle man, and they were held bound by that election and no farther. In this case, the sellers had *Seymour* liable

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by his acceptances at all events. The character of the transaction then was this, that *Seymour* was the mere agent, and *Pychlau* the person for whose benefit these goods were bought. Then what is there to shew that *Pychlau* was to have these goods on different terms than *Seymour* was to have them from the sellers; if *Seymour* was to have six months' credit, the fair inference is, that if he can be considered a seller at all, he must be considered as selling upon the terms of his original purchase.

ABBOTT J. I think the nonsuit was right. This was an action for goods sold and delivered, and if the parties did not stand in the relation of seller and buyer, this action cannot be maintained. And farther, if the goods had been sold upon credit, this action could only be maintained at the end of six months. There has been much argument to shew that the original vendors could not sue *Pychlau*. I will not give any opinion on that point, because those persons are not now before the Court; and I feel great reluctance in saying any thing which might prejudice their case. *Seymour* may have been a principal and purchaser as far as respects the original sellers, and yet an agent as between him and *Pychlau* the defendant, and this appears to me to have been his true character; he was the agent of *Pychlau*, pledging his credit for the benefit of *Pychlau*, and to have a commission for his trouble. On the other ground, I cannot think, if *Seymour* is to be considered as a seller, that this can be considered as a sale for ready money. I cannot conceive why the plaintiff should enter into such an engagement. If he had ready money, he would have paid it instantly, and there-

thereby have procured the goods at a cheaper rate. It is unnecessary to say what was the precise situation in which *Seymour* stood with respect *Pycklau*. I should rather say he was the agent; but if seller, he was a seller on credit for six months. On either view of the case, the nonsuit is proper.

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HOLROYD J. I am of the same opinion, that the nonsuit was right: and on the question whether the action could lie before the expiration of six months, I think the argument of my Brother *Abbott* is quite conclusive. *Seymour* was in this transaction merely the agent of *Pycklau*, although he may have made himself responsible to the sellers as principal; but if it were otherwise, and this could be considered as a sale from the owners of the goods to *Seymour*, and then a resale by *Seymour* to *Pycklau*, still it must have been a resale on the same credit on which *Seymour* himself had bought the goods; because otherwise *Pycklau* would have been paying a commission for nothing.

Rule discharged.

NELSON *against* WHITTALL. (a)

Thursday,
Nov. 6th.

ACTION by indorsee against the defendant, as maker of a promissory note, attested by one *W. Robson* as subscribing witness. At the trial before In an action on a promissory note, the subscribing witness being dead, proof of his hand-writing, and, that the defendant was present when the note was prepared, is sufficient without proving the hand-writing of the defendant. *Quere* if proof of subscribing witness's hand-writing alone would have been sufficient.

(a) Cause was shewn at *Serjeants' Inn*.

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Bayley J. at the last Spring assizes for the county of York, *Robson* the subscribing witness being dead, the plaintiff gave evidence of his handwriting, and further that the defendant was present in the room when the note was prepared by *Robson*, but no evidence whatever was given of the Defendant's handwriting. The learned Judge doubted whether the plaintiff ought not to have gone further, and have shewn that the defendant was the person who signed the note and whose signature was attested by the subscribing witness, and he therefore nonsuited the plaintiff, with liberty to move for a rule to set aside the nonsuit, and to enter a verdict for the amount of the note. Accordingly *J. Williams*, in last *Easter* term, obtained a rule nisi for that purpose, against which

Tindal now shewed cause. To prove the execution of deeds where the attesting witness is dead, or beyond the jurisdiction of the Court, proof of his hand-writing is sufficient; but there is no case where that has been held sufficient in the instance of a writing not under seal. The attesting witness to a deed undertakes to prove something beyond the mere signature, viz. that the instrument was sealed and delivered; which in their nature are of the very essence of the deed, but it is different where the instrument derives its obligation merely from the signature of the party.

Lord ELLENBOROUGH C.J. It has been the constant practice, in cases where the subscribing witness is dead, never to look at any thing beyond proof of the hand-writing of the witness, and I should think, that in all cases it is *prima facie* evidence of the instrument having been executed by the person whose name it bears.

bears. The question, however, may perhaps admit of some doubt; but it does not distinctly arise in this case; for here it was in evidence, that the defendant was present when the note was prepared, and that is sufficient to connect him with the instrument.

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BAYLEY J. It is laid down in Mr. *Phillipps's* Treatise on the Law of Evidence, that proof of the hand-writing of the attesting witness, is in all cases sufficient. I always felt this difficulty, that that proof alone does not connect the defendant with the note. If the attesting witness himself gave evidence, he would prove, not merely that the instrument was executed, but the identity of the person so executing it; but the proof of the hand-writing of the attesting witness establishes merely that some person assuming the name which the instrument purports to bear, executed it; and it does not go to establish the identity of that person, and in that respect the proof seems to me defective. In this case, however, there is evidence sufficient to connect the defendant with the note; for he was present in the room when it was prepared. It was held by Lord *Kenyon*, in the case of a bond (*a*), that the hand-writing of the obligor should be proved, as well as the hand-writing of the subscribing witness, and in analogy to that, by the statute 26 G. 3. c. 57. s. 38., deeds executed in the *East Indies* and attested by witnesses there, are made evidence on proof of the hand-writing of the parties, and of the witnesses, and also that the witnesses are resident in the *East Indies*.

ABBOTT J. I am by no means prepared to say, that proof of the hand-writing of an attesting witness,

(a) *Wallis v. Delancey*, 7 T. R. 266. n.

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is not sufficient. If it had been necessary in ancient deeds to prove, besides the hand-writing of an attesting witness, that of the party also, a great difficulty would have arisen; for in those times the parties seldom wrote, but merely fixed their marks, which would scarcely be distinguishable from one another: here however the party was present at the making of the instrument, so that there was satisfactory evidence of his identity.

HOLROYD J. concurred.

Rule absolute. (a)

(a) In *Carrie v. Child*, 3 *Campb.* 283. Lord *Ellenborough* C. J., in an action on a promissory note, to which there was an attesting witness, who had since become insane, held that proof of his hand-writing was sufficient to prove the making of the note. See *Gough v. Cecil*, *G. B. Trin.* 24 *G.* 3. *Serjt. Hill's MS.* vol. 21. page 78. cited in *Selwyn's N. P.* 4th edit. 516. n.

Thursday,
Nov. 6th:

HUGHES against MORLEY. (a).

The clause in the 12th sect. of st. 5 *G.* 2. c. 30. depriving bankrupt of all benefit from his certificate, in the case of losses at play, is to be considered as a qualification, restraining the operation of the 7th section, which makes the certificate a bar; and evidence of such loss may be given in a court of law on the similitur to the general plea of bankruptcy.

ACTION by an attorney, to recover the amount of his bill. Plea, bankruptcy, and issue thereon. At the trial before *Bayley* J., at the last spring assizes for the county of *Lancaster*, in answer to the defendant's plea of bankruptcy, the plaintiff offered to prove that the defendant had, in one day, lost more than 5*l.* at cards. *Scarlett* objected that upon this issue such evidence could not be received, and that the plaintiff, to

(a) Cause was shewn at *Serjeants' Inn*.

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avail himself of this objection to the certificate, ought to have replied specially to the plea of bankruptcy. The learned Judge, however, received the evidence: and a witness was called who stated that he was present when the defendant did in one day lose at cards more than 5*l*. The defendant's counsel called no witnesses in answer, but addressed the jury on the credit of the plaintiff's witness; and they found a verdict for the defendant. A rule was obtained in last *Easter* term by *Topping*, for setting aside this verdict, and granting a new trial, as being a verdict against evidence; and cause was now shewn by

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against
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Scarlett and Parke. The plaintiff cannot avail himself of this objection in a court of law, and if he could, not upon this issue; but he ought, at least, to have disclosed the special matter in his replication. By the seventh section of statute 5 G. 2. c. 30., the certificate is made a bar to any action unless the plaintiff can prove that it was obtained unfairly and by fraud, or can make appear any concealment, by the bankrupt, to the value of 10*l*.; the plaintiff has not proved either of these facts, and therefore if the seventh section had stood alone, the certificate would have been a bar: but by the twelfth section it is provided "that no bankrupt shall derive *any* benefit from his certificate, who upon the marriage of his children hath or shall have given, advanced, or paid above the value of 100*l*., unless he shall prove by his or her books fairly kept, or otherwise upon *his* or *her* oath, before the major part of the commissioners, that he or she had at the time thereof over and above the value so given, advanced, or paid, remaining sufficient to pay and satisfy their full and en-

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MORLEY.

tire debts; or who hath or shall have lost, in any one day, the sum or value of 5*l.*, or in the whole the sum or value of 100*l.* within the space of twelve months next preceding the bankruptcy, in playing at cards, &c.” Although this section takes away all benefit of certificate in the cases excepted, still it does not (as the seventh section does) enable the party to avail himself of the objection at law. The first case mentioned in that section (*viz.* that of the bankrupt giving his daughter above 100*l.* in marriage) clearly cannot be taken advantage of at law, but before the commissioners, or by petition to the great seal, against the allowance of the certificate; for in a court of law, the oath or books of the bankrupt cannot be evidence for him; and, as the case of losing money at play is provided for, in the same section, without pointing out any other jurisdiction before which the enquiry is to take place, the legislature must have intended to confine that enquiry to that jurisdiction to which it had expressly limited the other subject-matter, embraced in the former part of the clause. The twelfth section meant to deprive the bankrupt of his certificate where the objection is made before the commissioners, or at any rate only where it is taken in that course of judicial proceeding where the bankrupt’s own oath and books might be evidence for him, and that not being the case at law, none of the exceptions contained in that section can be taken advantage of in a court of law. But if the plaintiff could avail himself of this objection at law, he cannot at *nisi prius* upon this record, which only puts in issue the bankruptcy: but he should have disclosed in his replication the special matter on which he relied, and such a replication was upon the record in *Thornton v. Dallas.*

v. *Dallas*. (a) [Ld. *Ellenborough* C. J. In *Wilson* v. *Kemp* (b), a replication that defendant was, before the commission, discharged as a bankrupt, and that his estate had not produced fifteen shillings in the pound, was held bad, on special demurrer. That case is decisive, that the objection, (if available at law,) must be taken advantage of on the similitur.]

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Topping and *Littledale*, contra. The statute must be so construed as to make all the clauses operate. By the construction contended for, the twelfth section would not have its full effect, i. e. that of depriving the bankrupt of *all* benefit from the certificate, for though gaming within the statute be proved against him, still if his certificate entitle him to a verdict at law, he will thereby derive a benefit, at least, to the extent of the costs in the action; whereas by the express terms of the twelfth section he is deprived of all benefit; that therefore cannot be the true construction. By construing the twelfth section as annexing a further condition to those contained in the seventh section, and upon which alone he is by that section entitled to the benefit of the certificate, the clauses will be consistent with each other: and it is only by this interpretation that the clauses can stand together; for, admitting the defendant's argument to the full extent, (that not coming within either of the exceptions of the seventh section, his certificate is to avail him,) still any benefit thereby acquired, is taken from him, by coming within the twelfth section. And they cited *Lewis* v. *Piercy* (c), and *Ex parte Keimnett* (d), to shew that this objection was available in a court of law; and if so, the constant usage

(a) *Doug.* 46.(b) 2 *Macle & Selw.* 549.(c) 1 *H. Bl.* 29.(d) 1 *Ves. & Bea.* 193. 1 *Ro. Bp. Cas.* 331.

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of trying it on this issue has been confirmed by the authority of this court in *Wilson v. Kemp*.

LORD ELLENBOROUGH C. J. The question is, whether the evidence was well admitted under the record, as framed, there being no special replication. The habit, certainly, has been to prove under the similiter such facts as were competent to vacate the certificate. According to the decision of Lord Chancellor in *Ex parte Kennett*, the question whether the certificate is vacated, is a question cognizable at law. How then is the fact to be got at, if it be not competent to the plaintiff to give it in evidence on the issue? The case of *Wilson v. Kemp* decided that it cannot be replied specially to the general plea of bankruptcy; and if it cannot, it must, (if it be available at all,) be proved under the similiter. If, however, upon a new trial, it should be thought that this evidence ought not to be so received, the defendant may, by tendering a bill of exceptions, bring this question for decision before the highest tribunal. The seventh section certainly does not vacate the certificate on the ground taken in this case; but only when the plaintiff can prove the certificate obtained by fraud, or can make appear any concealment by the bankrupt to the amount of 10*l.*; no such ground exists in this case. But by section 12., it is provided and enacted, that nothing in this act shall be construed to give any privilege, benefit, or advantage, to any bankrupt who loses the sum or value of 5*l.* at play. This provision, although it follows at some distance in the act, must, I think, be considered as virtually incorporated with, and as communicating its exceptions to those contained in the

seventh section. But however, as I before stated, the question is still open, if the parties should desire to draw the construction of the act under further consideration.

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BAYLEY J. I entirely agree with my Lord in the construction which he has put on the 5 G. 2. As far as I can judge, it is clear that the twelfth section must be considered as a qualification, restraining the operation of the seventh section. If it be not open to the plaintiff to give this evidence under the similitur, in order to try the question as to the validity of the certificate, how is it to be tried? There is not any case in which a special replication has been held good; and *Wilson v. Kemp*, is an authority against it. It is true, that this matter may be a surprise upon the defendant; but the Court in granting a new trial, will direct the rule to be drawn up upon the express term that plaintiff shall confine himself to the answer given at the first trial.

ABBOTT J. I think that the proviso of the twelfth section must, consistently with the form of concluding the plea to the country, become the subject of enquiry at nisi prius, or otherwise the statute would not have its full operation. There is a material distinction between the parts of that proviso; by one, a person losing at play loses *absolutely* all benefit of the statute; but the bankrupt who has advanced above 100*l.* to his daughter, is not absolutely deprived of the benefit of the statute, but only, if it does not appear to the commissioners that he had at that time sufficient to satisfy all his debts. It is said, however, that it cannot be
done

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done in a court of law, because the twelfth section requires that the oath of the party shall be taken, and that cannot be done there; but it is not thence to be inferred, that the mere fact of losing money at play may not there be made the subject of enquiry. It seems to me that the whole of that first part should stand thus: a person giving more than 100*l.* to his daughter shall go before the commissioners to satisfy them that he had at that time sufficient to pay all his debts; the fact of giving 100*l.* might be the subject of enquiry at *nisi prius*; but that which is to destroy the effect of his having given 100*l.*, which would be an inconvenient enquiry at *nisi prius*, is to be made the subject of enquiry at another place.

HOLROYD J. It seems to me, that if we were to preclude the party from the evidence offered in this case, we shall not be giving effect to the twelfth section of the statute. By that section, the party is not to have the benefit of the act, if he has lost 5*l.* at any game; except for the seventh section, the defendant would not be entitled to any benefit at all from his certificate, and the twelfth section deprives him of any benefit from the act, if he has lost more than 5*l.* at play in any one day. If the plaintiff, then, was prevented from giving this fact in evidence, the defendant would be taking a benefit under the act: in order, therefore, to give effect to the twelfth section, we must consider it as overriding the seventh section, and depriving the bankrupt of all the benefit conferred by the seventh section. Then as to the plaintiff's argument, that the first clause, relating to the 100*l.* given in marriage to a child, cannot be made the subject of enquiry at *nisi prius*, I do not

agree to it; for the fact of his having given above the value of 100*l.* might have been so proved, although the exemption on the part of the bankrupt, from the disqualification arising from that fact, viz. the proving that he had sufficient to pay all his creditors their debts, is to be made the subject of enquiry before the commissioners; but whether that be so or not, although it should be held that the first clause of this section cannot be taken advantage of at nisi prius, still it by no means follows that the other parts of the section, which do not fall within the same reason, may not be so taken advantage of.

The Court, being of opinion that the verdict was against evidence, made the rule for a new trial

Absolute.

RICHARDS and Another against HEATHER. (a)

*Thursday,
Nov. 6th.*

ASSUMPSIT for work and labour. The declaration contained only one set of counts, charging the defendant in his own right. Plea, non assumpsit. At the trial before *Abbott J.* at the last spring assizes for the county of *Southampton*, the plaintiff proved two distinct demands; one due from the defendant individually, the other in respect of work done upon a ship, which had belonged to the defendant and one *Rous*, who had, jointly with the defendant, given directions for the work, and who was dead at the time of action brought. The learned Judge entertaining a doubt

Under a declaration containing only one set of counts, charging the defendant in his own right, the plaintiff may recover one demand due from the defendant individually, and another due from him as surviving partner.

(a) Cause was shewn at *Serjeants' Inn*.

whether

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whether in respect of this last demand the defendant should not have been charged as surviving partner, directed the jury to find a verdict for the whole sum claimed, with liberty to the defendant to move to reduce it to the amount of the first demand only, if the Court should be of that opinion. Accordingly, *Pell Serjt.* in *Easter* term last, obtained a rule nisi for that purpose; and now

Gaselee and *A. Moore* shewed cause. The objection, if any, must be on the ground that there was a variance between the declaration and proof; that on the face of the record, a separate debt is stated, whereas the proof applies to a joint debt. But if that were an objection, it would be equally so in the case where the partner is alive, and the party sued does not plead in abatement; yet there the defendant is not at liberty to insist on it as a variance. A fortiori, then, this objection cannot prevail, where the joint debt has ceased by the death of one of the two joint contractors, and has thereby become the *sole debt* of the survivor. If *Rous* had been living, the plaintiff might notwithstanding have charged *Heather* alone, who could only have pleaded in abatement. The defendant then cannot be in a better situation by the death of the party. The present form of declaration does not at all vary the rights of the defendant, nor could he derive any benefit from being charged as surviving partner. The only advantage that could accrue to him from that mode of declaring, would be, that the declaration would give him notice of the demand; but the same objection would apply with equal, if not greater force to a case where the party not sued was living,

living, and where the defendant would have an opportunity of pleading in abatement. In *Hyat v. Hare* (a), cited by *Grose J.* in *Smith v. Barrow* (b), *Holt C. J.* said "If there be two partners in trade, and one of them buy goods for them both, and the other dieth, the survivor may be charged by *indebitatus assumpsit* generally without taking notice of the partnership, or that the other is dead and he survived." And in *Slipper v. Stidstone* (c), where the question was whether a debt due to the defendant as surviving partner could be set off against a demand on him in his own right, the Court said "that the defendant might have declared against the plaintiff for this demand, and also for any sum due to him separately, if any such had been due, and that therefore there was no reason why the set-off should not be allowed." This then is an authority to shew that both the demands may be recovered in the same action; and *Hyat v. Hare* is decisive that it is not necessary to describe the defendant as surviving partner in respect of the last demand. Two sets of counts, therefore, would be unnecessary, and the whole demand may be comprehended in one set.

Pell Serjt., contra, admitted the authority of *Slipper v. Stidstone*, but contended that the doctrine there laid down must be taken with reference to a case where there are two distinct sets of counts. As to *Hyat v. Hare*, it appears to be merely a *nisi prius dictum* of *Holt C. J.*, but supposing that case to go to the full extent, it only establishes this, that where two persons are jointly liable, and one dies,

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(a) *Cumb.* 383.(b) 2 *T. R.* 479.(c) 5 *T. R.* 493.

the

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the Plaintiff may charge the survivor as if he were solely liable. But no case has decided, that where there are separate demands in two distinct rights, both can be recovered in the same action, where the record only claims from the defendant in his individual capacity. In *Spalding v. Mure* and two Others (a), the declaration contained counts against the defendants in their own right, without saying that they were the surviving partners of *Gregory*, whereas the original writ contained two sets of counts, one set against them as surviving partners of *Gregory*, and another against them in their own right. It was argued, that there was no variance between the writ and declaration, for under this declaration the plaintiffs might give in evidence every thing that was stated in the writ. In answer to this part of the argument, the Court said, that "it is not so: under a count for money had and received by the three defendants, to the use of the plaintiffs, the latter cannot give evidence of money had and received by the defendants and *Gregory*. If *Gregory* indeed had been alive, the defendants must have pleaded in abatement, that *Gregory* undertook jointly with them, if the fact were so; but as *Gregory* is dead, no such plea in abatement could be put in, and the present defendants may object at the trial to any evidence being given under this declaration of promises made by them jointly with *Gregory*." It may be admitted, that this was said incidentally; but it supports the opinion expressed by the learned Judge at the trial, and there is no reason why it should not be adopted. It is clear that in many instances of a similar nature, it is not unusual

(a) 6 T. R. 363.

to allege distinct rights in distinct sets of counts, and certainly convenience requires that the defendant should be informed by the record of what he is to answer at the trial.

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Lord ELLENBOROUGH C. J. I am of opinion that the Plaintiff is entitled to both the sums which he seeks to recover under this declaration. It would be more convenient in all cases, where a debt accrues from the defendant as surviving partner, to declare against him accordingly, because it is convenient to make the forms of declaration subservient to the information of the party charged; but it is not essentially necessary to the maintenance of the action, for where there are several partners who are living, one of them may be declared against as the sole debtor, and the only objection to this mode of declaring is, that the plaintiff is liable to be turned round, by a plea in abatement. But inasmuch as where the other partner is dead, there cannot be any plea in abatement, cessante ratione, cessat lex. The reason which requires that the demand shall be stated, as a joint demand ceases when the plea in abatement can be no longer pleaded. It seems to me therefore, that the plaintiff may maintain his action, as well for the demand, for which the defendant was liable individually, as for that for which he was liable jointly with the other partner, who is now dead. According to every principle of law, the joint debt may, by reason of the death of the party, be now treated as if it had been originally a separate debt. I think therefore there is not any occasion to make any distinction in the declaration on account of the sources from which the debts originally sprung.

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BAYLEY. J. I think that the plaintiff is entitled to recover both sums, and that the doctrine in *Spalding v. Mury* cannot be supported. Upon a count for work and labour, goods sold and delivered, and money had and received, &c. ; a plaintiff may recover all such demands as fall within the range of that count; if he has twenty demands, he may recover each and every particular demand, to which that count is applicable. Supposing there had been one demand only, viz. a separate demand, could plaintiff have been prevented from recovering that demand on this declaration, on the ground of a variance? Certainly not: it is true in respect of that demand he is solely indebted. Then as to the demand which was due, from the defendant and *Hous* jointly, the work was done for each, and each was liable for the whole; this is the argument adopted by Lord Mansfield in *Ries v. Shute*(a), "all contracts with partners are joint and several: every partner is liable to pay the whole." Proving that another person contracted, does not negative, that the defendant himself contracted. If that be the case, and if the work, which was originally done for *Hous* and *Heather*, was originally done for either, it follows that it may be truly predicated, that the defendant was solely indebted for work and labour done for him; and then I do not see, upon what principle, the plaintiff can be prevented from recovering for this demand also under this declaration.

ABBOTT J. I am of the same opinion. The question was reserved, in consequence of a doubt suggested by me, upon the form of the declaration; and my doubt

(a) 5 Burr. 2613.

was, whether it was not necessary to charge the Defendant, as surviving partner, in respect of the last demand. My doubt did not arise in respect of there being evidence given of two distinct demands, but in respect of the form of the declaration, as applicable to the last demand. It is possible that I may have had an indistinct recollection of what fell from the Court in *Spalding v. Mare*, but I now think, that the doctrine there laid down is not law. By the law of *England*, where several persons make a joint contract, each is liable for the whole, although the contract be joint. In *Whelpdale's case* (a), the plaintiff had declared on a bond made by the defendant, to which the defendant pleaded, *non est factum*; the jury found, that the bond was a joint bond, made by the defendant, and another, to the plaintiff, and upon this special verdict, it was adjudged by the Court, that the plaintiff should recover: "because when two men are *jointly* bound, in one bond, although neither of them is bound by himself, yet neither of them can say, that the bond is not his deed; for he has sealed and delivered it, and each of them is bound, in the whole." That was a case upon a deed, but *Rice v. Shute* was a case upon a simple contract; and it was there held, that although the promise was a joint promise, yet the defendant, who was sued alone, could not say, that he did not promise; and that the only way of taking advantage of the omission of the other joint contractor, was, by plea in abatement. These two cases establish this, that proof of a joint contract is sufficient to sustain an allegation that one contracted; and therefore, there is no vari-

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(a) 5 Rep. 119.

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ance; and if not, then the proof given in this case was competent to sustain the declaration in respect of both demands, and this rule must be discharged.

HOLROYD J. I think that the proof was properly received. The declaration charges, that the defendant was indebted in a certain sum, for work and labour, which he promised to pay. Under this declaration the plaintiff would not be entitled to recover any thing, except for a ground of action, corresponding with that, stated in the declaration. Now it is not disputed but that the joint demand was a demand coming within the description of work and labour; and if the defendant had been alone sued for it without the other, the plaintiff might have recovered, because there would not have been any variance. It seems to me, therefore, this demand may now be recovered, although there was a separate cause of action.

Rule discharged.

Thursday,
Nov. 6th:

FIRBANK and Another, Assignees of MANN, a Bankrupt, against BELL and Another. (a)

Where *C.* was directed by a letter from *B.* to pay out of the proceeds of his goods then unsold, in his

C.'s hands, a certain sum of money to *D.*, which *C.* consented to do, by letter to *D.*, (which letter was stamped with an agreement stamp,) and these letters being given in evidence to prove that the money was paid by order of *B.*; it was holden that they did not amount to an agreement between *B.* and *C.*, and, consequently, that the stamp was improper, and that the order itself for payment should have been stamped, as being an order for the payment of money out of a fund, which might or might not be available within the meaning of the stat. 55 G. 3. c. 584. *Sched. part 1.*

A SSUMPSIT for money had and received by plaintiffs as assignees of *Mann*, a bankrupt, to recover the produce of a cargo of mahogany the property of

(a) Cause was shown at *Serjeants' Inn.*

the

the bankrupt, and sold by the defendants for him. Plea, General issue, and notice of set-off. At the trial before *Wood Baron*, at the last Spring assizes for the county of *York*, the defence was, that the money in question had been paid over by the defendants in pursuance of *Mann's* directions previous to his bankruptcy, to establish which the defendants gave in evidence the following letters :

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Messrs. *Bell* and *Hendry* :

Hull, 30th September, 1815.

Gentlemen,

When the mahogany per *Regent* is sold, you will please pay over to Messrs. *Pease*, *Harrison*, and *Watson*, fifteen hundred pounds, in such bills as you receive from the said sale.

Gentlemen,

Your most obedient servant,

Samuel Mann.

Messrs. *Bell* and *Hendry* :

Sirs,

We beg your attention to an order we have received from Mr. *Samuel Mann* upon you for the payment of fifteen hundred pounds when you have effected the sale of his mahogany per the *Regent*.

We enclose a copy of the order for your government.

We are, Sirs,

Your most obedient servants,

Pease, *Harrison*, and *Watson.*

Hull, 30th September, 1815.

Messrs. *Pease*, *Harrison*, and *Watson* :

Gentlemen,

We have received your letter, enclosing copy of Mr. *Samuel Mann's* order of the 30th ult. to pay over to you

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against
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in such bills as we receive for the sale of the mahogany by the *Regent*, the sum of 1500*l.* We shall attend to this order immediately after paying ourselves 3000*l.* which we were previously in advance, the duty on the cargo, and such other necessary expences as we are or shall be liable to respecting said cargo.

We are, very respectfully,

Your most obedient servants,

Hull, October 2. 1815.

Bell and Hendry.

The letter of the 30th *September*, 1815, by *Pease* and Co. to the defendants, was stamped with an agreement stamp, but there was not any stamp on the other letters. *Scarlett* for the plaintiff objected to the bankrupt's letter being read in evidence, it not being stamped as a bill, draft, or order for the payment of money, to which it was answered, that these letters, taken together, constituted an agreement, and that under the last stamp act of the 55 G. 3. c. 184., where an agreement is contained in a series of letters, it is sufficient to have the agreement stamp affixed to any one. The learned Judge was of opinion that the stamp was sufficient, and a verdict was found for the defendant. *Scarlett* in last *Easter* term renewed his objection, and obtained a rule nisi for a new trial, against which

Hullock Serjt., and *Parke*, now shewed cause. These letters constituted an agreement between *Mann* the bankrupt and the defendants; *Mann* agreeing on his part that they should pay over the proceeds to *Pease*, *Harrison*, and *Watson*, and the defendants undertaking so to do in the event of their receiving such proceeds; and by the stat. 55 G. 3. c. 184. *sched. part 1.*, "it is provided,

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provided, that where divers letters shall be offered in evidence to prove any agreement between the parties who shall have written such letters, it shall be sufficient if any one of such letters shall be stamped with a duty of 1*l*. 15*s*., although the same shall in the whole contain twice the number of 1080 words or upwards." And these letters taken together amount to an agreement between the bankrupt and the defendant, and although the letter, which is stamped, is not an agreement per se, still it is parcel of an agreement; and if it operated as an agreement, it cannot operate also as a bill, draft, or order for the payment of money. Neither can it come within the words "out of a fund which may or may not be available," because that must mean a money-fund only, whereas here the property which was to furnish the means of payment was existing in specie, and it was uncertain whether it would ever produce funds in money to answer the calls upon it.

Lord ELLENBOROUGH C. J. I confess that I feel a difficulty in construing this to be an agreement. There is nothing to which the name of an agreement can be given if you do not pray in aid the order; that is the only thing by which the bankrupt is personally implicated; for he is not a party to the other letters. The order alone affects the bankrupt, and that amounts to nothing more than an order for payment. It falls then within the description of the act of parliament, viz. an order for the payment of money out of a fund which may or may not be available. It was the object of the legislature in framing this provision to treat as promissory notes and bills of exchange, and to subject to a stamp duty such instruments as, being payable on a

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contingency or out of a particular fund, could not in strictness fall under that denomination. This order appears to me to come as well within the spirit as the letter of the act of parliament, and therefore ought to have been stamped with the appropriate stamp. I have wished as much as possible to resist this objection, but I think it cannot be got over; there must therefore be a new trial.

Per Curiam,

Rule absolute.

Thursday,
Nov. 6th.

FENNY, on the Demise of MASTERS, against
DURRANT. (a)

The sheriff's return to an elegit stated that he had delivered an equal moiety of an house: Held that this return was void for not setting out the moiety by metes and bounds, and that the objection might be taken at nisi prius to an ejectment brought upon the elegit.

EJECTMENT for a messuage, yard, and garden.

At the trial before *Dallas J.* at the last Spring assizes for *Kent*, it appeared that the lessor of the plaintiff claimed as tenant by elegit, the sheriff's return to which stated "that the jury found that *J. C.* (the debtor) was seised in his demesne as of fee of and in one messuage, and a yard, garden, and appurtenants, &c., and then or late in the occupation of *Robert Durrant* (the defendant), and being of the clear yearly value of 16l. 16s. in all issues beyond reprises;" one equal moiety of which said messuage, yard, garden, and appurtenants, on the day of taking the inquisition, the said sheriff had caused to be delivered to the said *C. Masters* (the lessor of the plaintiff) in the said writ named, to hold to her and her assigns as her freehold, according to the form of the statute, &c." *Marryat* for the defendant objected that the sheriff had not set out a moiety of

(a) Cause was shewn at *Serjeants' Inn*.

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the house by metes and bounds as he ought to have done, and therefore the return was ill. The learned Judge, however, directed the jury to find a verdict for the plaintiff, with liberty to the defendant to move. And accordingly in *Easter term last*, *Marryat* having renewed his objection, and cited the opinion of *Holt C. J.* in *Pullen v. Birkbeak, Carth.* 453., obtained a rule nisi for entering a nonsuit, against which

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Onslow Serjt. and *Espinasse* now shewed cause. Whatever might have been the doctrine when it was usual to put the tenant by elegit into possession, still at present when the practice is to bring an ejectment, it is sufficient for the sheriff to deliver that for which an ejectment will lie; and it has been holden in *Sullivan v. Seagrave* (a), that ejectment will lie for part of a house. The language of the statute is "quod vicecomes liberet medietatem terræ," and it is wholly silent as to metes and bounds, and the writ of elegit framed on these words merely directs the sheriff to deliver a moiety. *Hutton*, 16. is the first case where it was held that the sheriff ought to deliver the moiety by metes and bounds: in all the old precedents there is not any mention of metes and bounds. But at all events this objection to the return could not be made at nisi prius, inasmuch as the return being filed the plaintiff ought to have applied to the Court to quash it. And they cited *Earl of Stamford v. Hobart*. (b)

LORD ELLENBOROUGH C. J. The language of Lord *Holt* in the case cited from *Carthew* is decisive, that if

(a) *Str.* 695.(b) 1 *Sidf.* 239.

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upon an elegit the sheriff delivers a moiety of an house without metes and bounds, such return is ill. Then as to the necessity of applying to the Court, that could only be to nullify the return. But what occasion could there be to apply to set aside that which by all the decisions was a nullity; it would be actum agere; the return was still-born.

BAYLEY J. In this case the jury might have found that the debtor was seized of such a house, and that such and such rooms constituted a moiety in value, and then the sheriff might have delivered those rooms to the lessor of the plaintiff. If the return is bad, the defendant has a right to say it is bad. The objection was raised in the same way as here at nisi prius in *Dow v. Lord Abingdon*. (a)

Rule absolute.

(a) *Doug.* 473.

See Charlesworth v. Ryland 1 C. & R. 296

UMPHREY against M'LEAN and Another.

Assumpsit for money had and received, brought to recover the amount of an excessive charge made by the defendants as collectors, on a distress for arrears of taxes: Held that the defendants were not entitled to a month's notice before action brought, under stat. 43 G. 3. c. 92. s. 70, which provides that no writ or process shall be sued out for any thing done in pursuance of that act, till after one month's notice.

ASSUMPSIT for money had and received. Plea, non assumpsit. At the trial before *Dallas J.* at the last Spring assizes for the county of *Kent*, it appeared that this action was brought to recover the amount of an excessive charge, made by the defendants as collectors of taxes, for their expences upon a distress upon the Plaintiff's property, for an arrear

of taxes. Two objections were raised on the part of the defendants, first, that under the stat. 43 G. 3. c. 99. the defendants were entitled to a month's notice, before action brought. Secondly, that the action had not been commenced in time, that is, not within six months next after the fact committed. The excessive charge having been clearly proved, the learned Judge directed the jury to find a verdict for the plaintiff, with liberty to the defendants to move. Accordingly, in *Easter* term last, *Gurney* obtained a rule nisi to set aside the verdict and enter a nonsuit, against which

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Marryat now shewed cause. The question is, whether in assumpsit to recover back money improperly taken from the plaintiff, the defendants are entitled to the protection afforded by the 7th section of the act, by which it is enacted, "that if any action shall be brought against any person, for any thing done in pursuance of this act, such action shall be commenced within six calendar months next after the fact committed; and no writ or process shall be sued, until one calendar month next after notice shall be given to the defendant, and the defendant may within the month tender amends, and may plead the same if not accepted in bar of the action, &c." This is an action for a non-feazance, in not returning back the money which the defendants extorted from the plaintiff. The act of parliament extends its protection to cases of misfeazance and trespass, and not to cases of this description. The action contemplated by the legislature is that species of civil remedy which is used to obtain a compensation for a tortious act done. In this case, the action is brought, not in consequence of an act done,

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done, but of the defendants omitting to do that which they ought to have done, i. e. return the money. In this case, the damages are confined to the precise sum, which the defendants wrongfully withhold. In actions of tort, the damages are in the discretion of the jury. The term, tender of amends, applies expressly to an action of tort; for in an action of contract, it is competent to defendants, without the aid of an act of parliament, to tender the sum due, and plead such tender in bar of the action. The legislature must therefore have contemplated actions where a tender could not otherwise be made. The action too is to be brought within six months after the *fact committed*: there was no fact committed here; the six months must therefore be calculated from an indefinite period. From the terms act done, fact committed, and tender of amends, it is evident that the legislature contemplated a different species of action from that now before the Court.

Gurney contra. The officers were authorized by the act to take the distress, and cause the same to be sold, and to deduct out of the proceeds the costs of the distress; and as they may in execution of the duties so imposed on them by the act have inadvertently made an undue charge, as well as committed any other wrongful act, it seems reasonable that they should have notice in one case as well as the other, for without such notice, they may not be aware of the specific cause for which the action is brought; and to shew that notice was required in an action for money had and received, he cited *Greenaway v. Hurd (a)*, where, in such an action, brought against an excise officer to recover back duties exacted

(a) 4 T.R. 553.

after

after the act of parliament imposing them had expired, such a notice was held necessary.

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LORD ELLENBOROUGH C.J. From the words of the act I am clearly of opinion, that it does not apply to a case of this description: all the expressions refer to some act done, or fact committed. There must be a positive act done: in this case, there was neither act done nor fact committed. The language of the act is too clear to admit of any doubt.

BATLEY J. If the Plaintiff failed in establishing his claim which is for a debt, he would, according to the construction contended for, be liable to treble costs.

ABBOTT J. By a subsequent part of the clause, the commissioners for the division are to defend the action, and the costs shall be defrayed by an assessment on the parish. I am very clear that the legislature did not intend the defence of such an action to fall on the parish.

HOLROYD J. concurred.

Rule discharged.

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CORK *against* SAUNDERS. (a)

A. being insolvent, by agreement stipulated to assign his property immediately, the creditors consenting that the business should be carried on for their benefit until the next *Michaelmas*, and that then the property should be divided among them; the insolvent assigned his effects; at the next *Michaelmas* several of the creditors who had signed this instrument agreed that the business should be carried on by the trustees for a further time: Held that a creditor who had signed the first agreement, but who had not in any way concurred in the second, could not maintain an action against the insolvent for a debt existing at the time of the first agreement.

ASSUMPSIT for goods sold and delivered. Plea, General issue. At the trial before *Dallas J.* at the last Spring assizes for the county of *Kent*, the defendant gave in evidence an agreement signed by the plaintiff and other creditors of the defendant, which recited that the said several creditors at a meeting on the 29th *March*, 1816, being of opinion that it would be desirable to carry on the farming concern in which the defendant was then engaged, had resolved that the same should be carried on until *Michaelmas* then next, for the benefit of the creditors who might concur in that resolution, and that they would enter into an agreement to release the said defendant from his debts on receiving such a composition as the produce of his effects would admit of being paid at that time. The agreement then stated, that two of the creditors had consented to be answerable for a sum of money to defray the expences of carrying on the concern, and contained a stipulation that an assignment should be immediately made by the defendant, of all his estate and effects, to four of the creditors in trust for the benefit of themselves and the remaining creditors. In pursuance of this agreement, the defendant shortly afterward executed an assignment of his effects to the trustees, and the farm was carried on by the defendant under the directions of the trustees, but no division of the property was made by the trustees at *Michaelmas*, according to the stipulations of the

(a) Cause was shewn at *Serjeants' Inn*.

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agreement; but on the 22d *November*, 1816, it was agreed at a meeting of the defendant's creditors, more in number than those who had signed the first agreement, that the farming concern should be carried on until *Michaelmas*, 1817, upon the same terms and conditions as were stipulated for in the original agreement. At this meeting the plaintiff was not present, nor did he, in any manner, concur in or assent to, the agreement then entered into. Upon these facts the learned Judge directed the jury to find a verdict for the plaintiff, with liberty to the defendant to move to enter a nonsuit: a rule nisi was accordingly obtained in last *Easter* term by *Marryat*, and now

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Garney and *Omyn* shewed cause. The question depends on the effect to be given to the first agreement: by that instrument the plaintiff agreed to accept the composition, in the full expectation that the effects of the insolvent would be sold at the then next *Michaelmas*, and that he should then receive such dividend as the produce of the effects would admit of. It was upon the faith of this stipulation that the plaintiff was induced to sign the agreement, and to consent to the farm being carried on until *Michaelmas*. The defendant has therefore violated that part of the agreement, which was the main inducement to the plaintiff to assent to the composition; for the property has not been sold, nor has any dividend been made. The agreement in fact existed till *Michaelmas* only, and it was competent to the defendant to have then insisted upon the sale and division of the property. The defendant or his trustees having neglected at that time to perform their stipulations, the agreement itself became a nullity: the consideration

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sideration for the composition has failed: the parties are remitted to their original rights. If it be competent to the trustees to carry on the business (without dividing the property) for one year, they may for two or any indefinite number of years, and the creditors may never receive any dividend, or the property may be all dissipated before the extended time is expired. As to the second agreement, that cannot affect the plaintiff, he not being either privy or party to it.

LORD ELLENBOROUGH C. J. The plaintiff by the terms of the agreement consents that the property of the defendant shall be assigned and be in the management exclusively of the defendant under the direction of the trustees until *Michaelmas*. How can the plaintiff then replace the other creditors in the same situation? I should have been inclined to remit him to his original rights, if all the other parties could have been placed in their original situation, but that is impossible. This is an anomalous case in which the plaintiff cannot stand in his former situation; nor can I say at present that the whole shall be nullified.

BAYLEY J. By the terms of the agreement, it is stipulated, that the farming concern shall be carried on until *Michaelmas*, for the benefit of the creditors who might concur, and it contains a farther stipulation, that the debtor shall assign all his estate, *immediately*; the consequence of which would be, that he would thereby divest himself of all means of payment. It is true that the defendant remains in possession, but as servant only to the trustees: he has not a single article of property which he can appropriate to the payment of his

his debts. The plaintiff confides in the trustees, that they will perform the duties reposed in them: this they neglect to do, and they postpone the period at which they ought to sell. The non-division however of the property cannot, under the circumstances, remit the creditor to his original rights. The parties not having provided for that event by the terms of the agreement, it appears to me that their only remedy is in equity. Suppose the trustees had refused to sell, and the defendant had urged them on; could the plaintiff have sued in that case? The conduct of the defendant in respect of the postponement amounts only to this, that he does not find fault with the trustees. But I do not think that that puts the plaintiff in a better situation than if the postponement had been the mere act of the trustees.

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ABBOTT J. The agreement is not very accurately worded; it provides, however, that the debtor shall assign all his effects, and therefore deprives him of all means of payment. Two persons agree to advance two several sums of money; the plaintiff by signing the agreement, induces them to make themselves responsible for this advance, and the defendant is induced to assign his effects. It is not contended, that prior to *Michaelmas* the plaintiff could have sued; but it is said, that as the trustees did not sell at *Michaelmas*, the plaintiff may now sue; but how can the debtor get back his effects? I think, therefore, that the circumstance of the plaintiff's not having concurred in postponing the sale does not remit him to his original right of action. Whether any other remedy may be open to him is another question; it is worthy of remark that

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the number of creditors who agreed to postpone the sale exceeded the number of those who originally signed the agreement.

HOLROYD J. The only doubt which I can entertain in this case is in consequence of the instrument containing an agreement to release on payment of the composition. If that had been omitted, inasmuch as there is a fund provided, it might perhaps have been a satisfaction of the debt, and might have been so pleaded, according to the doctrine laid down in *Heathcote v. Cruickshanks*. (a) The effect however of this agreement to release seems to be this, not that the composition should operate immediately as a satisfaction when paid, but that the creditors were then to give a formal release by deed, and that the debtor was not to be discharged until such deed was executed. It seems to me, therefore, that the plaintiff is not entitled to recover.

Rule absolute.

(a) 2 T. R. 27.

PHIPPS *against* SCULTHORPE. (a)

Where premises had been let to B. for a term determinable by a notice to quit, and pending such term C. applies to A., the landlord,

for leave to become the tenant instead of B., and upon A. consenting, agrees to stand in B.'s place, and offers to pay rent: Held that (though B.'s term had not been determined either by a notice to quit or a surrender in writing,) A. might maintain an action for use and occupation against C., and that the latter could not set up B.'s title in defence to that action.

ACTION for use and occupation, and verdict for the plaintiff for a year's rent. At the trial before Dallas J. at the last spring assizes for the county of *Surry*, the plaintiff gave in evidence that in *February*,

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1815, the premises in question were let by him under a written instrument to one *Newton Frier-hicks*, at a certain rent, to hold from the 14th *February*, for three calendar months, and from the expiration of that period for three calendar months longer, and so on, from three months to three months, and either party was to give the other six calendar months' notice to quit. That the defendant, after *Hicks* had occupied the premises about two months, applied to the plaintiff, to become the tenant instead of *Hicks*, stating that *Hicks* owed him a sum of money, which he hoped to get by taking his stock, and that upon his consenting, the defendant took the premises, and agreed to stand in *Hicks's* shoes, and further that the Defendant offered to pay the plaintiff a quarter's rent. It was objected, that the plaintiff could not recover, because *Hicks*, not having transferred his interest to the plaintiff, still had in him the legal interest, and that the present plaintiff, having no legal estate, was not entitled to recover; but the learned Judge directed the jury to find a verdict for the plaintiff, reserving to the defendant leave to move to enter a nonsuit; and *Marryat*, in last *Easter* term, obtained a rule nisi, against which cause was now shewn by

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Onslow Serjt. (*Arabin* was with him). To make the defendant liable for use and occupation it is sufficient to shew that he occupied as tenant to the plaintiff: and he cannot then dispute his landlord's title. The evidence is abundant on that point: he offers to stand in the place of *Hicks* who before was the tenant, and by the landlord's assenting to that proposal, the defendant himself became tenant; and if any thing were wanting to

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prove a tenancy, it is amply supplied by an express offer to pay rent. The Court here called upon

Marryat. The legal interest in these premises was conveyed to *Hicks*, in 1815, by the written agreement, and that interest must continue in him till terminated in the mode there pointed out, *i. e.* by six months' notice to quit; no such notice was given, therefore *Hicks's* interest must have continued up to the present time, unless he has duly surrendered his estate in the premises. By the statute of frauds, such a transfer of his interest to be valid must be in writing: *Botting v. Martin* (a), and *Mollett v. Brayne* (b), are decisive that a tenancy from year to year, is not determined by a parol licence from the landlord to the tenant to quit, as well as that a parol assignment of a lease from year to year granted by parol is void under the statute of frauds. *Hicks*, therefore, did not duly surrender his interest; and that being a continuing term and never assigned, *Hicks* still continued tenant; and as between the parties to the suit, the legal relation of landlord and tenant never subsisted; and the effect of determining that the plaintiff may recover in this action, will be, that he has a double remedy for the rent, both against *Hicks* and the defendant.

Lord ELLENBOROUGH C. J. I think that there is sufficient evidence to entitle the plaintiff to recover: the defendant applies for leave to take the premises, and upon obtaining the landlord's consent, does take them, and agrees to stand in *Hicks's* shoes; and besides that, he

(a) 1 Campb. 317.

(b) 2 Campb. 103.

offers to pay rent: this is more than sufficient to create a tenancy; and being once a tenant, it is not competent to him to dispute his landlord's title.

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BAYLEY J. I think that the defendant, by taking the premises of the plaintiff, and agreeing to stand in *Hicks's* shoes, became tenant, and that he cannot call in question his landlord's title to let.

ABBOTT J. The defendant agrees to take the premises of the plaintiff, does take and enter, and then says, that his landlord has no right to let: whereas by a well-recognized rule of law a tenant cannot dispute the title of his landlord.

HOLROYD J. concurred.

Rule discharged.

HOLLAND and Another *against* HALL and
GILL. (a)

Thursday,
Nov. 6th.

DECLARATION stated, that by agreement (21st May, 1816), between the plaintiffs and defendants it was agreed (inter alia) that the plaintiffs would sell to the defendants one third share in a ship called the *Richmond*, for a certain sum, one moiety to be paid for by the defendant *Gill's* acceptance payable six

Where *A.* agreed to sell to *B.* one-third share of a ship, which was then to be employed on a joint adventure, in the exportation of military stores to South Ame-

rica, contrary to an order in council then in force: Held that (the agreement being entire, and containing on the face of it an illegal stipulation,) it lay on the party seeking to enforce the same to shew that means had been used to obtain a licence, or that the illegal purpose had been abandoned, and that in failure thereof *A.* could not recover for the share of the ship.

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months after date from that day, and the other moiety to be paid by the defendant *Hall's* like acceptance; the ship to be taken with all faults as she lay in the *Queen's* dock on the 2d *December* then last, after which date, all expences upon her to be borne in the same proportions as the interests were held; the plaintiffs to bear two-thirds of all outfit and disbursements, and the defendants one-third thereof; and the plaintiffs agreed to furnish an account of all disbursements incurred upon the said vessel, since the 2d of *December* then last, up to the time of her sailing from *Liverpool*; and to receive in payment for the same the defendant *Gill's* acceptance of the plaintiffs' draft for one half the same, at four months' date from the day the vessel should be cleared at *Liverpool* custom-house; and for the other half of the said charges and disbursements, the defendant *Hall's* like acceptance of the plaintiffs' draft. Averment, that plaintiffs did sell the defendants one-third share of the ship, and that they, in pursuance of the agreement, drew bills of exchange upon *Gill* and *Hall* which were presented for payment; but that the defendants refused to pay the said bills or in any other way to pay for the price of the said ship; and that although the plaintiffs did furnish the defendants with an account of all disbursements, since the 2d *December* up to the 1st *July*, 1816, the time of the vessels sailing from *Liverpool*, one-third of which amounted to £ ; and although the vessel, on the 16th *June*, was cleared out of *Liverpool* custom-house, and although the plaintiffs caused their drafts to be presented to the defendants respectively, for a moiety of their disbursements for their acceptance; yet the said defendants refused to accept the said drafts, or

to pay the amount of the disbursements. Plea, general issue. At the trial before *Dallas J.* at the last spring assizes for the county of *Surry*, the plaintiff, in support of his case, gave in evidence the agreement, which contained, besides the part set out in the declaration, among other things, the following clause: "And it is hereby further agreed between the said parties, that they shall be jointly interested in the same proportions, in a voyage to be undertaken with the said ship *Richmond*, from *Liverpool* to a port in *Holland*, with a cargo of rock salt; and also in a further voyage to *South America*, with a view to sending out some military stores to that quarter. For this purpose, *Holland Ackers* and Co. have lately bought a quantity of military stores, which they now hold, and also the said *George Gill* and *John Hall* have bought a quantity of similar articles, and it is the intention of these parties to ship the said military stores on board of some small vessel, either from *Liverpool* or *London*, which may be chartered for the purpose, to go to a port in *Holland*, to meet the *Richmond*, with a view to be transhipped on board her, as circumstances may best direct." It was objected, on the part of the defendants, that the exportation of military stores was contrary to an order in council in full force at the date of the agreement, and such order in council by the act 29 G. 2. c. 16. having the same force as an act of parliament, and this being one entire contract, the whole instrument was vitiated. No evidence was offered that the plaintiffs either obtained or used any means to procure a licence. *Dallas J.* directed the jury to find a verdict for the plaintiffs, with liberty to the defendants to move to enter a nonsuit. The jury found a verdict

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for the plaintiffs, and in *Easter* term last, a rule was obtained by *Marryat* for setting aside the same, and entering a nonsuit; and now cause was shewn by

Gurney and Chitty. Although this agreement, if carried into effect before the expiration of the time limited by the order in council, and without a licence, would be illegal, still as the mere effluxion of time, the procuring of a licence, or the abandonment of the illegal voyage, might legalize the whole, it is not necessarily unlawful; and the presumption is in favour of its legality. And they cited *Sewell v. Royal Exchange Assurance Company* (a), *Haines v. Busk* (b), to shew that subjects may enter into a contract illegal at the time, which may be rendered lawful before it is actually completed.

Marryat and *Comyn* contra were stopped by the Court.

LORD ELLENBOROUGH C. J. The parties by this agreement appear to have contemplated one entire adventure, which was originally illegal; and I cannot discover that the illegal purpose was ever abandoned; or that any thing was done to legalize it.

BAYLEY J. concurred.

ABBOTT J. If there be, on the face of the agreement, an illegal intention, is it too much to say, that the burden lies on the party who uses expressions *primâ facie* importing an illegal purpose, to shew that the intention was legal?

HOLROYD J. concurred.

Rule absolute.

(a) 4 Taunt. 256.

(b) 5 Taunt. 521.

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CARTRIDGE *against* GRIFFITHS. (a)

DEBT on bond. The declaration was in the following form: *Wm. Cartridge*, treasurer of the friendly society of *Loyal Britons*, complains that defendant, on the 22d Sept. 1810, by his writing obligatory, &c., acknowledged himself to be bound unto one *Wm. Farley* (then being treasurer of the said society) in the sum of

l.; and that the said defendant had not paid the said sum of money to *Wm. Farley* while he was treasurer as aforesaid, or to the plaintiff since he has become treasurer, or to any other person on behalf of the said society. Plea, non est factum. At the trial before *Burrough J.* at the last spring assizes for the county of *Gloucester*, the bond produced in evidence was a common money-bond from the defendant to *Wm. Farley*, without stating him to be treasurer of the society; but it was proved that this was a security belonging to the society, that *Farley*, at the date, was treasurer, and that the plaintiff had succeeded him in that office. It was objected that this was a variance, and the learned Judge considering the point doubtful nonsuited the plaintiff, with leave to move to enter a verdict; and a rule nisi having been obtained in last Easter term by *Jervis*, cause was now shewn by

Declaration by *B.* a treasurer of a friendly society, on a bond to *A.*, then being treasurer; Plea, non est factum, the bond given in evidence was to *A.*, without stating him to be treasurer to the society: Held that *B.* was entitled to recover.

Jessop. By stat. 33 G. 3. c. 54. s. 11. "all securities and effects belonging to these societies vest in the treasurer, and on his death or removal in the succeeding treasurer, and shall in all law-proceedings be stated to

(a) Cause was shewn at *Serjeants' Inn*.

be

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be the property of such treasurer." It is not shewn on this record that the bond was given to *Wm. Farley* in his character of treasurer, but only *then being treasurer*; and it may consistently with that allegation have been given to him in his individual character; and in that case the present plaintiff can have no right of action. [Lord *Ellenborough* C. J. By the 6th section it is provided that the treasurer may take securities in his own name without other description: if that be an objection, it is on the record; but what is the variance which was the ground of nonsuit?] Assuming that the declaration shews the bond to have been given to *Farley* as treasurer, there is a variance between the bond in the declaration and the bond produced in evidence, for the bond produced in evidence is to *Farley* in his individual character.

LORD ELLENBOROUGH C. J. The declaration does not state that the bond was given to *Farley* as treasurer, but only *then being treasurer*. The effects of the society vest by law in the treasurer; and the operation of the statute is to transfer the security, which vested in *Farley*, to the plaintiff, who is alleged and proved to be the present treasurer. I cannot, therefore, discover any ground for saying, that there is any mistake. The plaintiff says that the defendant is bound to him, and he is bound.

BAYLEY J. The only issue is, Did the defendant execute such a bond as is stated in the declaration? Now the bond in the declaration is stated to be a bond to *W. Farley, then being treasurer*: the allegation, then
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being treasurer, is no part of the bond, but an extrinsic fact.

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ABBOTT and HOLROYD Js. concurred.

Rule absolute.

ROOTH *against* WILSON. (a)

CASE against the defendant for not repairing the fences of a close adjoining that of the plaintiff, whereby a certain horse *of plaintiff*, feeding in the plaintiff's close, through the defects and insufficiencies of the fences, fell into the defendant's close, and was killed. Plea, not guilty. At the trial before *Richards* Baron, at the last spring assizes for the county of *Nottingham*, it appeared that the horse was the property of the plaintiff's brother, who sent it to him on the night before the accident; that the plaintiff put it into his stable for a short time, and then turned it, after dark, into his close, where his own cattle usually grazed, and that on the following morning the horse was found dead in the close of the defendant, having fallen from the one to the other. The liability to repair was admitted. Defence, that the plaintiff had not such a property in the horse as to entitle him to maintain this action. The learned Judge, however, suffered the cause to proceed, and the jury found a verdict for the plaintiff. In *Easter* term last a rule was obtained by *Reader* for setting aside this verdict

A. sends his horse, for the night, to *B.*, who turns it out after dark into his pasture-field, adjoining to and separated from a field of *C.* by a fence, which *C.* was bound to repair; the horse, from the bad state of the fence, falls from one field into the other, and is killed: Held that *B.*, though a gratuitous bailee, might maintain an action against *C.* and recover the value of the horse.

(a) Cause was shewn at *Serjeants' Inn*.

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and having a new trial, against which cause was now shewn by

Copley Serjt. The plaintiff had a property in the horse sufficient to entitle him to maintain this action: he had possession of the horse, as a gratuitous bailee, and possession is sufficient, as against a wrongdoer. Thus a bailee of goods to keep, or an agister of cattle, may maintain trespass (a) against a wrongdoer: and in the case of felony, it has been holden that the property is well laid in the following bailees; agister of cattle, innkeeper, washerwoman, carrier, and even in a stage-coachman not being a part-owner of the coach. (b) These authorities are decisive in support of the plaintiff's right to maintain this action. It may be said that the defendant would thereby be subjected to the costs of actions, both at the suit of the bailee and the absolute owner of the property; but the case of *Flewelin v. Rave* (c) is decisive that that consequence would not follow. It was there expressly held "that if goods are bailed to one man, to bail to another, and the first bailee doth not deliver them over, but converts them to his own use, he thereby makes himself liable to an action, both of the first bailor and of the person to whom they were to have been bailed; but both shall not have their action, but he that first begins the action shall go on with the same." The present plaintiff must, therefore, go on with the action he commenced, and the judgment obtained by him will be a bar to an action by the other. (d) To support this action, it is

(a) 2 Roll. Abr. 551.

(b) 2 East, P. C. 653.

(c) 1 Bulstrode, 69.

(d) Bro. Treas. 67. 2 Roll. Abr. 569. pl. 5.

not necessary that the plaintiff should be liable over to the original owner of the horse; if it were, however, he was so liable in this particular case; for he turned the horse, after dark, into a dangerous pasture, to which it was unaccustomed; and though the place might be perfectly safe to his own cattle, which were used to it, yet to this animal it was otherwise; it was negligence therefore in him, in turning the horse into that field, and in that case he is clearly liable to the original owner.

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Reader contra. The gist of this action is, the consequential damage; the person, therefore, who has actually sustained the damage, must sue. The plaintiff having no interest in the horse, is not damaged by its death; and therefore cannot sue: the action can only be maintained by the owner of the animal, he alone being damaged. The plaintiff has not paid, or been called upon to pay, the value to the owner; assuming, however, that a mere liability to damage is sufficient to enable him to maintain this action, he has here incurred no such liability; for he has been guilty of no negligence. A gratuitous bailee is bound to take the same care only of the property intrusted to him, as he would of his own; and the plaintiff in fact turned the horse into that pasture-field, which his own cattle were in the constant habit of using: in so doing he took the same care of the property intrusted to him, as he would of his own; and then he is not liable over to the original owner.

Lord ELLENBOROUGH C. J. The plaintiff certainly was a gratuitous bailee, but as such, he owes it to the owner of the horse not to put it into a dangerous pasture; and if he did not exercise a proper degree of care
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he would be liable for any damage which the horse might sustain. Perhaps the horse might have been safe during the daylight, but here he turns it into a pasture to which it was unused after dark. That is a degree of negligence sufficient to render him liable: such liability is sufficient to enable the plaintiff to maintain this action; he has an interest in the integrity and safety of the animal, and may sue for a damage done to that interest.

BAYLEY J. I am entirely of the same opinion: the plaintiff by receiving the horse becomes accountable. Case is a possessory action; the declaration merely states that it was the horse of the plaintiff; if this had been an indictment, might it not have been described as the horse of the plaintiff? as in the common case of goods stolen from a washerwoman.

ABBOTT J. I think that the same possession which would enable the plaintiff to maintain trespass, would enable him to maintain this action.

HOLROYD J. The plaintiff was entitled to the benefit of his field not only for the use of his own cattle, but also for putting in the cattle of others; and by the negligence of the defendant in rendering the field unsafe, he is deprived in some degree of the means of exercising his right of using that field, for either of those purposes. Whether, therefore, the damage accrues to his own cattle, or the cattle of others, he still may maintain this action.

Rule discharged.

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The KING *against* The Inhabitants of WANDSWORTH. (a)

INDICTMENT against the defendants for not repairing a common highway. The defence was, that it was a private and not a public road. At the trial before *Dallas J.* at the last spring assizes for the county of *Surry*, it appeared that this was a road distant five miles from the metropolis, lying between enclosed grounds, with a common at one end, where the cattle fed at all times of the year; that about forty-four years ago, in a part of this road where there had been a slough, a brick arch had been turned at the expence of one of the parishioners; that for eleven years successively, another of the parishioners had compounded for his statute duty, by repairing a part of this road; that it had been constantly used by the parishioners for conveying gravel from pits on *Wandsworth* common for the repair of the other roads in the parish; besides which, much evidence was given to shew that it had generally been used as a highway. These facts were proved on the part of the prosecution. The defendants called no witnesses, and the jury found a verdict for the defendants. In *Easter* term last, *Gurney* applied to the Court for a rule to shew cause why there should not be a new trial, admitting at the same time, that it was contrary to the usual practice of the Court to entertain such a motion where the defendant had been acquitted upon an indictment. The Court, adhering to their rule not to grant

Where the defendant has been acquitted on an indictment for not repairing a road, the Court will not grant a new trial; yet they will, under very special circumstances, suspend the entry of judgment, so as to enable the parties to have the question reconsidered upon another indictment, without the prejudice of the former judgment.

(a) Cause was shewn at *Serjeants' Inn*.

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a new trial in such a case, permitted *Gurney* to take a rule for staying the entry of the judgment upon the verdict given at the trial.

Marryat and *Lawes* now shewed cause against the rule, and contended that the effect of the present rule, if successful, would be to grant a new trial in a criminal case, when the defendant had been acquitted, and that was contrary to the practice of the Court; and they cited *Rex v. Reynell* (a), and *Rex v. Mann*. (b)

Gurney and *Nolan* contra. If this verdict be followed by judgment and another indictment be preferred, the judgment may be given in evidence, and will operate strongly with the jury; if the Court, therefore, see that this verdict is against the weight of the evidence, they will feel disposed to make this rule absolute, which will enable the prosecutor to try the question again without the prejudice that must necessarily be created by the verdict given in this case; and they cited *Rex v. The Inhabitants of Oxfordshire* (c), and *Rex v. Inhabitants of Middlesex* (d), to shew that under special circum-

(a) 6 East, 315.

(b) 4 M. & S. 337.

(c) 16 East, 223.

(d) *Rex v. The Inhabitants of Middlesex*. This was an indictment for not repairing *Kingston* bridge. Defendants pleaded, that from time immemorial the bailiffs and freemen of *Kingston* had repaired, and of right ought to repair the same. The case stood for trial at the sittings after *Trinity* term, 53 G.3.; but a similar indictment, charging that from time immemorial the bailiffs and freemen of *Kingston* were bound to repair, immediately preceded it, and was first tried. Upon that trial there was evidence that the corporation was liable; but it turned out that the bailiffs were officers of comparatively modern creation, and that they, therefore, could not be immemorially bound to repair. Upon that indictment the defendants were, therefore, acquitted; and *The King v. Middlesex* being then called on, the defendants' counsel found that

cumstances such a rule had been acted upon in this court.

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LORD ELLENBOROUGH C. J. My objection to making this rule absolute is, that the Court will thereby be doing indirectly that which, if they did directly, would be contrary to the established practice of the Court, acted upon in a variety of cases; that is, they will in effect be granting a new trial in a criminal case, where the defendant has been acquitted. But there certainly have been instances (as in the cases of *Caversham* and *Kingston Bridge*,) where the Court has suspended the effect of a former verdict, when great injustice would arise from precluding further discussion. In the *Kingston bridge* case, if we had not adopted this rule, the county of *Middlesex* would have been fixed with the repair of the bridge, though it appeared upon the evidence that other persons were bound. So in this case, it seems to me, that to maintain the present verdict would be to send the parties to a second trial, with a millstone

that the same fact which occasioned the acquittal in the last case, i.e. that the *bsiliffs* and freemen were charged to be liable, must equally render it impossible for them to support the plea. The consequence was, that a verdict of guilty passed against the defendants; and if judgment had been entered on this verdict, the county of *Middlesex* would have been subjected to the expence of repairing this bridge, till the result of another indictment against the corporation of *Kingston* was ascertained. The Court, therefore, on the motion of *Gurney*, in the following *Michaelmas* term, granted a rule nisi for suspending the entry of judgment, (another bill of indictment having in the intermediate time been preferred and found against the corporation of *Kingston*,) until that indictment could be tried: that rule was afterwards made absolute, and upon the trial of this second indictment the corporation were found guilty.

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about their neck, the weight of which it would be impossible to resist. If this question had depended merely on the evidence of user of the road as a highway, and there had been no circumstances drawn from the acts of the parish, I should have been extremely unwilling to have granted the indulgence prayed; but to refuse it here would be injustice to the parties, inasmuch as there is evidence both of the user of it as a highway, (in the instances of gravel carried over it for the repair of other highways in the parish,) and of repairs by the parish; because, if the repairs are done by a parishioner under an agreement with the parish, in consideration of his being excused his statute duty, that is virtually a repair by the parish. There are, therefore, circumstances which differ this from ordinary cases, and make it a case fit to be tried again. By staying the proceedings, we do in effect give the parties the benefit of an ulterior consideration. But, inasmuch as this is an indulgence, we shall impose it as a term that the parishioners of *Wandsworth*, (whose testimony would not be legal evidence, on the ground of interest,) shall be examined at the next trial; and this rule shall only, therefore, be made absolute upon the terms of the prosecutor consenting to that effect.

BAYLEY J. concurred.

ABBOTT J. This is a question in which the public are interested; and, as there are circumstances in the case that require further investigation, I think it is both convenient and just that the prosecutor should have an opportunity of presenting this case to another

other jury, without the prejudice of a judgment against him.

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WANDSWORTH.

HOLROYD J. concurred.

Rule absolute. (a)

(a) *REX v. The Inhabitants of CHIGWELL.*

Jessop, within the first four days of this term, applied for a similar rule in this case, which was an indictment for not repairing a road, tried before *Dallas J.* at the last assizes for the county of *Essex*; and he cited the foregoing case, *Rex v. Wandsworth*. Lord *Ellenborough C. J.*, on the motion, desired that a case, in which the rule was granted under very special circumstances, should not be drawn into a precedent; that if it were, it would enable parties to defeat the operation of a well-established rule; the Court would, however, in this instance, refer to the learned Judge who tried the case; and afterwards, on a subsequent day in this term, *Jessop* was informed that they had done so, and the result of their inquiries led them to refuse the rule.

See the King v. Dallas & al. 1817 456

The KING against COTTERILL. (b)

Thursday,
Nov. 6th.

INDICTMENT for a nuisance in erecting pens in the High-street of the town of *Walsall*, and driving pigs and other cattle into the pens, and confining them

King *Charles* the Second, by charter granted to the corporation of *Walsall* two fairs, to

be holden annually within the borough and foreign, and confirmed to them all markets which they then held, with a reservation of the rights of the lord of the manor; it appeared that a market had been holden immemorially in the High-street of *Walsall* until a very late period, when the corporation, finding it inconvenient, removed it out of the High-street to another and more convenient place within the borough; the corporation had exercised acts of ownership in pulling down an old market-house and erecting a new one; the clerk of the markets, however, had been appointed by the lord of the manor, but he did not receive any toll from the persons frequenting it. The defendant having been indicted for a nuisance in erecting stalls in the High-street after the removal of the market, the Judge, upon the trial, left it to the jury to say whether the corporation were owners of this market; adding, that if they were, the right of removal was incident to the grant. The jury having found in the affirmative, the Court refused to grant a new trial.

(b) Cause was shewn at *Serjeants' Inn*.

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there. Plea, not guilty. At the trial of this indictment, at the last Spring assizes for the county of *Stafford* before *Park J.*, it appeared that *King Charles the Second* by a charter (22d *February*, 13 *Car. 2.*) reciting “that the borough and foreign of *Walsall* from time immemorial had enjoyed divers jurisdictions, franchises, and privileges, as well by prescription as by reason of several charters, and that doubts having arisen concerning the liberties of the borough, granted and declared that the borough or town of *Walsall* should be thereafter a free borough, and that the mayor and burgesses of the borough or town of *W.* and the burgesses and inhabitants of the borough or town and foreign, and their successors, should be a body corporate, &c. with power to make by-laws for the good order and government of the burgesses, artificers, and inhabitants of the borough and foreign, and for supplying the borough and foreign with necessaries, and to impose reasonable penalties for the disobedience of them.” And in another part of the charter the king granted to the mayor and commonalty of the borough and foreign, and their successors, “that they and their successors should hold within the borough and foreign, the liberties and precincts thereof, two marts or fairs every year,” and in a subsequent part the king granted and confirmed to the mayor and commonalty, and their successors “all and all manner of liberties, franchises, immunities, privileges, jurisdictions, *markets*, and hereditaments, which the mayor and commonalty of the borough and foreign now hold, use, and enjoy, or have held, &c.” and at the conclusion of the charter, the king wills “that these his letters patent shall not extend, or be construed to extend to the prejudice of the lord

lord of the manor of *Walsall*, but that he shall enjoy all his profits and privileges notwithstanding these presents." It appeared also, that from time immemorial a market had been holden in the High-street of *Walsall*, that pens had been erected there, for the use of which sixpence per pen used to be collected by the bellman, an officer of the corporation, who provided the pens; but that the corporation permitted him to keep the money for his own use. Two fairs were annually holden, and on those days the market people paid double toll. The corporation had lately built a new market-house, having sold the materials of the old market-house, which by an inscription on a stone appeared to have been erected at the expence of the corporation in 1692. Before the year 1816, pigs had been commonly exposed to sale in the High-street; but great inconvenience having been experienced therefrom, the corporation had lately made a new and convenient market-place for the sale of pigs and cattle, upon a scite within the borough, near to and leading out of the High-street, and by a by-law (15th June 1816) they had ordered that the market and fairs for pigs and other cattle should thenceforth be held there, and not in the High-street as before had been accustomed. It appeared also, that Lord *Bradford*, who lived in the neighbourhood, was lord of the manor (a), that he appointed the clerk of the market, but according to the evidence of his steward, a resident in the town, Lord *Bradford* never received or claimed any toll or emolument from the persons frequenting the market. The defendant, after notice of the fore-

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(a) It was admitted, in the course of the argument, that the borough, manor, and foreign were co-extensive.

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going order of the corporation, had continued to erect his pig-pens in the High-street, whereupon this prosecution was commenced. Evidence was given on the part of the defendant, that in addition to the 6*d.* for the stalls found by the bellman, a penny was paid for the use of the lord of the manor, but the person to whom, this penny was said to have been paid, for the use of the lord, was not called. The learned Judge left it to the jury to say, whether the market belonged to the corporation or to the lord of the manor; adding, that if they found that the market belonged to the corporation, the right of removing it to a convenient place within the borough followed as of course. He intimated, however, to the jury the propriety of finding the defendant guilty, as that would enable the defendant to take the opinion of the Court upon the case if he pleased, whereas a verdict of acquittal would preclude all further discussion. The jury found the defendant guilty. In *Easter* term last, *Puller* obtained a rule nisi for a new trial; against which

Jervis, W. E. Taunton, and Oldnall shewed cause, and contended, first, that the corporation of *Walsall* were owners of the market; and, secondly, that being owners, they were authorized in removing it to any place within the limits of the borough, for the convenience of the inhabitants. To establish the first point, they relied as well on the language of the charter, which stated this to be a corporation by prescription, and contained a confirmation to the mayor and commonalty of all markets which they then held, as on the evidence that markets had been immemorially holden. In addition to this, they said there was evidence of acts of ownership, in taking down the old

old market-house and rebuilding another, sufficient to shew that the corporation were owners of the soil, as well as lords of the market; but it was not necessary to go to that extent, for supposing the ownership of the soil to be in the lord of the manor, still it would not follow that he was owner of the market; for the right of soil may be in one, and the right of market in another; and even supposing the fact of stallage having been paid to Lord *Bradford* had been clearly established, that would not have been conclusive; for it appears from *Heddey v. Welhouse* (a), that stallage and pickage are incident to the soil, and it is there said, that if the king grant a fair or market, with toll certain to one and his heirs to be holden in land which is borough-english, and the grantee die, the heir at the common law shall have the market and the toll, but the younger son shall have the stallage and pickage, with the soil, by the custom. Secondly, The right of removal is incident to the ownership of the market, according to the doctrine laid down by Lord *Ellenborough* C. J. in *Curwen v. Salkeld* (b), which is not distinguishable in substance from this case; for although there the grant was *Henrico Curwen domino villæ et manerii*, those words were mere description of the person, and that decision did not proceed on the ground of his being lord of the manor. It is true that this charter is wholly silent as to place, and only confirms to the corporation markets generally; and the evidence shews that the market has always been holden in the High-street; but the Court will not hence infer that the market was by the terms of the original grant confined to the High-street. Such an inference does not neces-

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(a) *Moor*, 474.(b) 3 *East*, 538.

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sarily arise; for it is not usual in grants of this description to limit fairs and markets to particular spots; and in this very charter, by the terms of the grant of two fairs which immediately precedes the confirmation of the markets, the fairs are to be holden within the borough and foreign. If a conjecture may be formed as to the terms of the original grant of the market from the terms in which the fairs are granted in this instrument, it should seem that the market was to be holden within the borough and foreign; and if so, this case falls precisely within the authority of *Curwen v. Salkeld*, and still more strongly within *Dixon v. Robinson*. (a) The nuisance was clearly established, and it was proved that the scite of the new market was within the limits of the borough.

Dauncey and Puller contra. As to the first point, the circumstance of Lord *Bradford* having appointed the clerk of the market, is much stronger to shew the ownership in him, than the facts relating to the pulling down and erecting the market-houses; and further, the charter contains an express reservation of the rights of the lord of the manor. Secondly, the cases of *Dixon v. Robinson* and *Curwen v. Salkeld* are distinguishable; in the former, the grant was to keep the fair in what place they would; and in the latter, it was a grant of a market *infra villam*. This goes beyond either of those cases; for here it is not said that the market shall be holden where the corporation pleases, nor that it shall be holden within the borough; no place is mentioned in the charter. The right of

(a) 3 *Mod.* 108.

holding

holding this market must be tried in the same manner as if the corporation were prescribing for a market, in which case they must allege, that they were lords of a market, and also within what place such market was to be holden. If the corporation had claimed a moveable market by prescription, the evidence would have negatived such a right, because it would have shewn that this market had been immemorially holden in the High-street. The question however has not been fairly submitted to the jury, for it was only left to them to say, whether the corporation were lords of the market, whereas the proper question was, whether they were lords of such a market as would enable them to remove it out of the High-street into any other place. The mere ownership of a market, does not carry along with it the right to remove; and in the absence of any grant fixing the limits, the jury would have said that the usage was the only limit. In *Curwen's* case, the origin was shewn so as to carry along with it the right to remove to any place infra villam; here there is not any evidence as to place, except the usage; that confines the market to one spot, namely, the High-street: it may therefore fairly be inferred, that the original grant was a grant of a market to be holden in the High-street. If the corporation have a right to remove it out of the High-street, they may remove it to any distance they may think proper; for when once the limits of the High-street are abandoned, there is no other boundary to circumscribe their power of removal.

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Lord ELLENBOROUGH C. J. It seems to me that the only point of doubt in this case arises from the circumstance

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stance of Lord *Bradford* having appointed the clerk of the market. But no great stress can be laid on that fact as establishing the ownership of the market in Lord *Bradford*, inasmuch as he does not appear to have contended for it, and indeed his steward repudiates the right to receive any emolument from the persons frequenting it. The great question is, whether the corporation as lords of the market have the power of removing the market; and in order to decide that, we must look at the charter, and consider the object which it had in view. In the charter itself, do we find any words whereby the lords of the market are restrained from moving the market from the place where it had been holden to any other place, so as to meet the objects of the charter; and if that is silent, then can any restraint be implied from the nature of the thing? The charter only contains a confirmation of markets generally, which it supposes to have been holden from time immemorial. This then is a case of a prescriptive market, undefined as to place. The terms of the charter not containing any expression which points at limitation of place, what limits can be imposed except such as arise from the reason of the thing, namely, the limits of the borough and foreign of *Walsall*. To suppose in favour of a restrictive clause would be to infer something prejudicial to the object of the grant. What was the object of the grant? By grant, I do not mean the present charter, but that which took place in time beyond the memory of man. The object certainly was that this district should have the benefit of a market to be holden within its limits for the convenience of the inhabitants. The borough of *Walsall* is a place of considerable extent. Suppose the course of trade had car-

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ried the population to another part, at a distance from that where it was seated at the time of the grant: to confine the market to a place, to which the present population could not conveniently resort, would tend to defeat the object of the grant. It seems to me, therefore, that the power of removal is incident to the grant, provided such removal be not prejudicial to the object of the grant. If indeed the removal be to an inconvenient place, that would lay the foundation of a *scire facias* to repeal the grant. As to the question submitted to the jury, whether the corporation were the grantees of this market, I think there cannot be any doubt. The charter contains a confirmation of markets; there is also a grant of fairs to be holden within the borough and foreign. This is a strong confirmation of the right to the market being in the corporation, for to hold a fair within that district would be prejudicial to the owner of the market if the rights were in different persons; but if the same person were entitled to both, there would not be any injury. In addition to this, the corporation sold the materials of the old market-house, and built another in its place. This also affords strong evidence of the right; but that question has been left to the jury, and they have expressly found the fact. Then as to the limits, if the corporation be lords of a market undefined as to place, the only mode of fixing the limits is by reference to the convenience of those who are the objects of the grant. It seems to me that in the absence of words of express limitation, the market may be holden in any place within the borough, so as to answer the general objects of the charter. The case might have been otherwise, if there had been any evidence which had fixed the market within any certain defined limits,

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as within so many yards from the church, or the like; but I do not find any such evidence in this case. In the view which I have taken, it appears to me, that the corporation, being owners of the market, are not restrained from holding it where they now profess to hold it; subject to this limitation only, that if it has been improperly removed, the grant may be repealed.

BAYLEY J. I think this was a right verdict. There are two questions; first, whether the corporation are the owners of this market; and, 2dly, if they be the owners, whether they are the owners of a moveable market, or of a market necessarily confined to the High-street. As to the first point, the only persons who can claim the market are Lord *Bradford* and the corporation. The only evidence as to Lord *Bradford* is, that he appoints the clerk of the market. That may have originated from this circumstance, that at the time of the grant, as the limits of the manor and borough are co-extensive, the right of the market may have been granted to the corporation on this limitation, that Lord *Bradford* should appoint the clerk. That might be the share which at the time of the original grant was allotted to him. If he had been the owner of the market, it is natural to suppose he would have received some toll or emolument. On the subject of emolument, it does not appear that there is any thing like a market-toll collected. The only toll which is paid, is paid as a compensation to the person who brings out the stalls and carries them back again. If there had been stallage, that would have resulted to the owner of the soil, and not to the owner of the market. I think the verdict giving the ownership to the corporation was right, as

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the market-house was built by them and not by Lord *Bradford*; they pulled it down, took away the materials, and built a new one. That shews they were lords of the market. But the charter raises a stronger inference. It grants to the corporation two fairs, and confirms markets in general words. If the right of the market had been in Lord *Bradford*, there ought to have been a writ of *ad quod damnum* to inquire to what extent such grant of the fairs would be prejudicial to his right. It must have been prejudicial twice in every six or seven years, as the fairs and the markets would necessarily be holden on the same day. These circumstances convince me, that the jury were right in finding that the corporation were owners of the market. Then, as to the limits, it appears to me, that this was not a question for the jury, but a question of law for the decision of the Judge. It was argued by the counsel for the defendants, that there is nothing to look to but the usage only, and as that usage restrains the market to the High-street, the right is also restrained. But I think there is a fallacy in saying you are to look at the usage only; that is not so, for we must look at the nature of the thing granted, and to whom it is granted. This is the case of a market granted to a corporation, and not to any person specifically, and was intended as a medium of benefit to others. This is a corporation subsisting by prescription; the object of that corporation is to provide for the general good government of all persons within a certain district, viz. the borough of *Walsall*. If the grant had been to the proprietors of houses in a certain street, the nature of such a grant would have fixed the limits within which it was to be holden. But when it is

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granted to a corporation, who have the convenience of the inhabitants of a limited district under their control, it must be intended that they have the power of shifting the market as such convenience may require. There might be originally a great convenience in holding the market in the High-street; for at the time of the grant, the High-street might be the only street; that place might afterwards become most inconvenient, in consequence of the population shifting from that place. I should think therefore, as far as the nature and subject-matter of the grant enable us to presume, we may fairly presume, that the intention of the charter was not to limit it to a particular spot, but that the right should be co-extensive with the benefit sought to be conferred. It seems to me, therefore, that this was not a question for the jury, or if the question had been left to them, it should have been left with such directions as would have drawn this conclusion, that it was a moveable market. Assuming that the evidence necessarily confined the market to the High-street, Mr. *Puller* argued rightly, that if the corporation had in a special plea claimed a moveable market by prescription, there would have been a variance between the plea and the evidence; but I differ from him in this; for I say that the evidence does not necessarily raise the presumption that the market was to be confined to the High-street: in my view of it, it only shews that the right of holding the market, as to place, was co-extensive with the borough and foreign.

ABBOTT J. I think the verdict given in this case a proper verdict, and the only proper verdict that the jury under the circumstances of this case could have given.

given. There are two questions, first, whether the corporation are lords or owners of the market; and, secondly, supposing them to be so, whether they are confined to holding a market in the High-street, or whether they are at liberty to remove it to some other convenient place within the borough. I use the expression convenient, because if the market were not removed to a convenient place, such removal might have been questioned in another form. As to the first question, the only point of doubt is the clerk of the market having been appointed by Lord *Bradford*. I cannot satisfy my mind how that has happened; but notwithstanding this, and although the agent of Lord *Bradford* is living in the town, and Lord *Bradford* himself not far distant, yet no claim was set up by him to the market; and although there is some evidence of a penny having been paid for his use, yet it does not appear that the person who paid it was called. There are strong circumstances to shew that this market belonged to the corporation: the money for the stalls appears to have been paid to a person appointed by the corporation; the market-house belonged to them; and they produce a charter which confirms to them markets and gives them a right to hold two fairs. The words markets found with many other general expressions in the charter would not have had any great operation or effect, if it had not appeared that markets had been constantly holden. But when that appears, it shews that the markets have been holden by those to whom they were confirmed. The right of fairs also is inconsistent with the right of market being in any other person. I think, therefore, that the evidence shews, that the corporation were owners of the market. The next question

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question is, whether the corporation were bound to hold the market in the High-street, or whether they may remove it to any other convenient place within the borough. The only circumstance against the removal is, that the market has always been held in the High-street; but let us consider what is the usual language of these charters, or rather what we may suppose to have been the language of this grant; where the grant is to a corporation, the expressions usually are *per burgum et per villam*; if to a lord of a manor, *infra manerium*; therefore, we must presume that the language of the original instrument granting this market was in similar terms; and I am more inclined so to do, when I consider the general object of the grant, which was intended for the benefit of all the inhabitants of the town, not only those who existed at the time of the grant, but those who might come in afterwards. Their convenience seems to require that there should be a power of removal, and that the market should be holden in a place most convenient for the inhabitants. Considering, therefore, the general language of these instruments, and the convenience resulting from a power of removal, I should rather infer that the original grant was in the usual form, than that it was confined to a particular place.

HOLROYD J. I am of the same opinion. The defendant endeavours to set up a right in Lord *Bradford*, which he does not appear to claim. If Lord *Bradford* had a right to the market, I cannot conceive on what ground the corporation had a right to pull down the old market-house and erect a new one. Lord *Bradford* does not object to the removal; but the defendant,
a stranger,

a stranger, claiming no right but that of coming to the market, sets up a right in Lord *Bradford* which his steward disavows. It appears to me that the language of the charter confirming the markets, and the circumstances relating to the market-houses, afford strong evidence of the right of the corporation. As to the other point, this is a prescription claimed by the corporation of the place who were originally either inhabitants or persons who were to have jurisdiction over the inhabitants for the benefit of the district. It is a general rule in the construction of charters, that such a presumption shall be made *ut res magis valeat quam pereat*, that is, that the object of the grant shall be attained rather than defeated. Nothing is to be inferred from usage to cripple the grant. It will be found in looking into the books, as far as my recollection goes, when a market by prescription is pleaded by a corporation, it has been limited to a particular district: it is quite different in the case of a grant to an individual. In a grant to a corporation the probability is, that they should have the privilege of holding a market any where within the district over which they have jurisdiction; and this is more probable, inasmuch as the old charters are couched in very general terms, and are extremely short. On these grounds, I am of opinion with my Brothers that the verdict is right.

Lord *Ellenborough* at the close of the case observed, that he did not recollect any instance of the grant of a market within certain limits in a town.

Rule discharged.

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Thursday.
Nov. 6th.

HAGGERSTON *against* DUGMORE and Others.

Where commissioners, by an enclosure act, were empowered (inter alia) to make roads and to defray the expence by a rate on the several proprietors, and they executed their award as to the allotments before the roads were completed, or sufficient funds were raised for that purpose: Held that they might afterwards make a rate to defray the expence of completing the roads.

TROVER for goods. Plea, not guilty. The plaintiff was an occupier of lands in the parish of *Dry Drayton* in *Cambridgeshire*. The defendants were commissioners under an act for enclosing waste lands in that parish, and as such had distrained upon the plaintiffs' goods for a rate imposed by them to defray the expences of completing the roads; and the whole question turned upon the legality of that rate. The act of parliament passed in 1809; the commissioners made their award in 1811, the roads at that time not being completed; and before the making of the award, the expences attending the act were settled and adjusted at a certain sum, including therein a sum paid into the hands of the surveyor for completing the roads, (but which was admitted to be wholly inadequate for that purpose). The present rate was made in 1815, four years after the execution of the award. At the trial before *Abbott J.* at the last assizes for the county of *Cambridge*, it was contended, that the authority of the commissioners ceased on the execution of the award, and that they had no power to make the rate in question. The learned Judge however thought that the rate was legally imposed, and nonsuited the plaintiff.

Blosset Serjt. now moved to set aside the nonsuit. By the private act, the expences of forming, completing, and repairing the roads, are to be raised in the same manner as the expences of obtaining the act,

i. e.

i. e. by an assessment on the several proprietors; and by the ninth section of the general enclosure act (a), surveyors neglecting to complete the roads within a limited time are to forfeit 20*l*. The defendants (before they made their award) might have limited a time for completing the roads, and imposed a rate to defray the expences of the same; but having made their award, their authority, like that of other arbitrators, is at an end, by their having fully executed the power committed to them. The commissioners are also empowered, in one *particular* case, to rectify a mistake after making their award. As a special authority is reserved to them in this one case, it must be inferred that (except in that instance) the legislature meant their authority to cease with the execution of their award. The duty of the commissioners is not to complete all roads, but to examine what the expence of completing such roads will be, and to make their assessment accordingly, before they finally execute their award. The commissioners in this case ought to have delayed their award until they saw that the money levied was sufficient to defray the expence of completing the roads; but having made their award, their power ceased with the execution of their authority.

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 HAGGERSTON
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Lord ELLENBOROUGH C. J. I think that this non-suit was right. According to the argument, the commissioners must have delayed making their award to ascertain the boundaries for a length of time, until the roads were either completed, or the expences of

(a) 41 G. 3. c. 109.

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completing the same could be ascertained; this would be most inconvenient, and would greatly impede the object of the act.

BAYLEY J. There is no distinct provision in the act, to shew that the award on this subject must be final; and the construction contended for would be attended with most mischievous consequences. For if the commissioners are bound, before they make their award, to raise all the money necessary for completing the roads, they must act in the dark. They are bound, too, to pay over this money to the surveyor, before they execute their award. If it exceed the sum actually expended, and the surveyor absconds, what becomes of the rights of the public? I therefore think, that as there is no express provision in the act that the award should be final, it follows from the nature of the subject that the power of the commissioners should continue until they had finally executed the duty imposed upon them, one part of which duty was to complete the roads.

HOLROYD J. The power of the commissioners must, from the reason of the thing, continue till they have fully executed the duty imposed upon them by the act; till the roads have been completed, they have not fully discharged their duty, and therefore their authority is not finally executed. The argument (if of any weight) rather goes to affect the award of the commissioners, than to prove that they have executed their authority.

Per Curiam,

Rule refused.

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ROE, on the Demise of TRUSCOTT, against
ELLIOT.

Friday,
Nov. 7th.

EJECTMENT upon a demise, laid the 10th *October* 1816, for an undivided 4th part of an estate called *Tregascome*, in the parish of *St. Stephen, Branswell*. At the last assizes for the county of *Cornwall*, before *Burrough J.* the case was thus: The lessor of the plaintiff claimed the premises in question as heir at law of one of two aunts of *Jane Wise*. *Jane Wise* being seised in fee of a moiety of *Tregascome*, by indentures of lease and release, (18th and 19th *November* 1773,) previous to her intermarriage with *Joseph Andrew*, conveyed the same to *Joseph Andrew* for life, with an ultimate remainder, after several remainders over, to her own right heirs. The marriage took effect; *Jane Wise* died in 1782, in the life-time of her husband, without issue. After her death, one *Henry Andrew*, who was the heir of the other aunt of *Jane Wise*, but claiming to be *Jane Wise's* sole heir, by lease and release, (30th and 31st *August* 1790,) conveyed his reversionary interest in a moiety of *Tregascome* to *Wm. Rogers* in fee; and in *Hilary* term following, in pursuance of a covenant contained in that conveyance, levied a fine sur cognizance de droit come ceo, &c. with proclamations. *Joseph Andrew* died in 1814. The defendant claimed as the devisee of *Wm. Rogers*; and upon the death of *Joseph Andrew* took possession; and the only question was, whether an actual entry were necessary on the part of the lessor of the plaintiff to avoid the fine so levied

If one of two tenants in common of a reversion levy a fine of the whole, such fine does not require an actual entry by the other tenant in common to avoid it.

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by *Henry Andrew*. The learned Judge was of opinion that such an entry was not necessary, and directed the jury to find a verdict for the plaintiff, with liberty to the defendant to move; and accordingly,

Gaselee now moved to set aside the verdict and enter a nonsuit, on the ground that an actual entry was necessary; that here was an assumption of the whole by the party making the conveyance, and a fine levied accordingly, which it was clear might be levied of a reversion; and these facts amounted to an actual ouster. And he referred to *Peaceable v. Reed* (a), *Doe v. Prosser* (b), and *Doe v. Perkins*. (c)

LORD ELLENBOROUGH J. C. I do not see how there could be any assumption of the whole at a time when the party making the conveyance and levying the fine could not by possibility have the possession of any part.

BAYLEY J. The defendant was not in actual possession until 1814, and there was not any fine levied after that period. The conveyance would operate only on a moiety of the estate; that is, a moiety of a moiety, or one-fourth part. I do not understand how there can be an actual ouster of a reversion. The principle of *Rowe v. Power* (d) is the same as this; there it was held that if a fine be levied by a person in remainder, an actual entry is not necessary to avoid it.

Rule refused.

(a) 1 *East*, 568.

(b) 1 *Cowp.* 227.

(c) 3 *M. & S.* 271.

(d) 2 *N. R.* 1.

Reg. v. Inhabitants of Reddington 12 B. 40.

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RHODES *against* AINSWORTH.Friday,
Nov. 7th.

THIS was an issue tried at the last assizes for the county of *Lancaster*, and the question was whether the inhabitants of the chapelry of *Milne Row*, at their own exclusive costs and charges, from time immemorial had repaired the chapel; the affirmative of that issue lay on the plaintiff; and his case having been closed, the defendants called a witness of the name of *Milne*, who being examined on the voir dire, stated that he was an owner of a tenement in the chapelry, which tenement was then in the hands of a tenant, who was rated for the same and had paid the rates, having agreed to pay his rent without any deduction, under a lease, of which many years of the term were then unexpired. The owner's name did not appear on the rate, and he resided at a considerable distance from *Milne Row*, in the county of *York*. The witness was objected to by the plaintiff's counsel on the ground of interest, and the learned Judge decided in their favour, and rejected his testimony, and a verdict was found for the plaintiff.

On an issue to try whether the inhabitants of *A.* were immemorially bound to repair a chapel; the owner of the inheritance having leased his property for years at a rent certain, without any deduction, and residing himself in a different county; is not a competent witness to negative the liability, although he was not upon the rate, and the rate was in fact paid by his tenant; for such owner has an interest in discharging the inheritance from a permanent burden.

Topping now moved for a rule nisi for a new trial and relied upon the principle established by the case of *The King v. Kirdford* (a), viz. that to render a witness incompetent his interest must be actually existing at the time and not one that is expected. In the present case *Milne* the witness had in fact no interest at all; he was seventy-five years old, resided far from the chapelry.

(a) 2 East, 559.

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and had let his tenement on a lease the terms of which could not be varied by the result of the action, and he was not and could not therefore be liable to any rate for the repair of the chapel.

LORD ELLENBOROUGH C. J. I am clearly of opinion that the witness had an interest in the event of the suit; he is interested in the value of that which is to be affected by the rate, and that value will be diminished by any permanent charge attaching to it. The rate in question is a perpetual burden on the estate; and every owner of a fee-simple is directly interested in that which renders it less valuable, if he should offer it as an object of sale. I therefore think, that the learned Judge was perfectly right in rejecting the testimony.

BAYLEY J. I am of the same opinion, and think this a very plain case. The question is, whether the witness is interested immediately in the event of the suit: I think he is; not on the ground of being already rated, but that his property will be burdened with a permanent charge. The estate will sell for more or less according as this burden attaches to it or not, and therefore he had an immediate interest in preventing the burden from attaching.

ABBOTT J. I am of the same opinion. The owner of an estate is interested in every question which can be raised as to charging his estate. The question to be tried upon this issue was, whether the owners of property within the chapelry were liable to a charge of repairing the chapel. If they were so liable, the tenant could not afford to pay to the landlord so much rent as

he otherwise would. The landlord therefore had an interest in shewing that the charge did not attach on the inhabitants of the chapelry, and he was actually and therefore immediately interested in removing this burden, and thereby improving the value of his estate. The case cited by Mr. *Topping* was a case of a mere occupier not having any permanent interest; there the party had not any estate of which the law could take notice.

1817.

RHODES
against
AINEWORTH.

HOLROYD J. I think this evidence was properly rejected. The question at the trial was one which went not merely to affect the present but the permanent value of the estate. The question was, whether the inhabitants of the chapelry were bound by immemorial usage to repair the chapel; if they were, the effect of the verdict would be to fix a permanent charge on all future inhabitants of the chapelry, and the rent of the owners of property in that chapelry would in future be diminished in proportion to that charge. The witness tendered on the part of the defendant was an owner of property in the chapelry, and as such had an immediate interest in removing from that property a burden which went permanently to diminish the value. It is not necessary that the witness should be actually rated in order to render him incompetent: for the question is, whether he is a person coming to give evidence in a matter in which he is interested; and if he is, the law deems him incompetent.

Rule refused.

1817.

Saturday,
Nov. 8th.

TRELAWNEY *against* COLEMAN.

★ In an action for adultery, letters written by the wife to the husband, (while living apart from each other,) proved to have been written at the time they bore date, and when there was no reason to suspect collusion, are admissible evidence, without shewing distinctly the cause of their living apart.

*v. Miller v. Bernard
& Bing 376.*

IN an action for adultery, tried before *Holroyd J.* at the *Middlesex* sittings after last term, letters from the wife to the husband (while apart from each other) were offered in evidence by the plaintiff to shew that they lived on terms of mutual affection. It appeared that they had been separated for six months only, and they had lived together some months before the wife became acquainted with the defendant. The plaintiff had been a midshipman in the navy, and was a man in slender circumstances. The letters were proved to have been written at the time they bore date, and long before the wife was suspected of adultery, or was even acquainted with the defendant: but no direct evidence was given as to the cause of their living separate when the letters were written: and *Gurney* objected that they could not be received. But *Holroyd J.* permitted them to be read, and the plaintiff had a verdict.

Gurney now moved for rule nisi for a new trial, on the ground of these letters having been improperly received in evidence; and he contended that they ought not to have been read until the cause of the husband and wife living apart distinctly appeared. In the only case where such evidence was received, *Edwards v. Crock (a)*, the parties lived as servants in different families, and were therefore necessarily separated from each other: in this case, their separation is unaccounted for.

(a) 4 Esp. 39.

LORD ELLENBOROUGH C.J. I have no doubt that these letters were admissible evidence. What the husband and wife say to each other is, beyond all question, evidence to shew their demeanor and conduct, whether they were living on better or worse terms: what they write to each other may be liable to suspicion; but when that is cleared up, that ground of objection fails: that was satisfactorily explained in the present case by proof of the letters being written at the time they bore date, and long before any suspicion of the wife's misconduct.

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TRELAWNEY
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BAYLEY J. I think these letters were properly received: when it is once established that the manner in which the husband and wife conduct themselves towards each other, (when together,) is admissible evidence; it follows that letters, which in absence afford the only means of shewing their manner of conducting themselves towards each other, are also admissible. There may indeed, in letters, be an assumed affection, which does not actually exist; but the behaviour of the parties themselves is open to the same objection; for they may (when together) assume an appearance of affection which has not any foundation in truth and sincerity. As to these letters, there is nothing to raise any suspicion of collusion, for they are proved to have been written at the time when they bear date, and long before any suspicion of the adulterous intercourse.

ABBOTT J. There was very sufficient proof in this case, that the letters were written at the time they bore date, and when no suspicion was entertained of the wife's misconduct; and that being established, I think
they

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against
COLEMAN.

they were properly received to shew that the husband and wife were living upon good terms.

HOLROYD J. concurred.

Rule refused.

Saturday,
Nov. 8th.

HURST *against* PARKER.

Trespass for breaking and entering coal-mines and taking away coals. Plea, *actio non accrevit infra sex annos*. To which the plaintiff replied in the affirmative. At the trial no evidence was given to shew that the trespass was actually committed within six years: Held that evidence of a promise to make compensation, made by defendant before the commencement of the action, and when he was threatened with an action for taking away coals, was not sufficient to support this issue; by which the plaintiff was bound to prove the affirmative, that he had a good cause of action within six years before the commencement of the suit.

TRESPASS for breaking and entering certain coal-mines, and carrying away coals. 1st Plea, not guilty; 2d, *actio non accrevit infra sex annos*.

At the trial before *Garrow B.* at the last assizes for the county of *Salop*, it appeared that the plaintiff and defendant were owners of adjoining lands and coal-mines; that the plaintiff having recently commenced working her mines, had discovered that the defendant had encroached upon her property, and had carried away considerable quantities of her coals. The defendant had for many years (certainly exceeding six) been in the constant habit of extracting coals from his mines. No distinct evidence was given as to the time when the trespass was committed by the defendant. It was proved, however, that before the commencement of the action the plaintiff applied to the defendant for a compensation for the coals so taken away by him or his workmen, and threatened in case of refusal to commence an action; and that the defendant then promised he would make a proper compensation. On his failing

to do this, the present action was brought. It was insisted at the trial, that this amounted to an acknowledgment of the cause of action within six years, sufficient to take the case out of the statute of limitations; but the learned Judge thought that it was only evidence of a cause of action subsisting at the time that the promise was made, and not at the time of the commencement of the suit; and the plaintiff was therefore nonsuited.

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Richardson now moved for a new trial, and contended that the promise of compensation being made under threat of an action must be taken as an admission that there was then a good subsisting cause of action; and he cited the cases of *Hyeling v. Hastings* (a), and *Leper v. Taunton* (b), to shew that a promise to pay created a fresh cause of action, and that at all events it ought to have been left to the jury to say upon the evidence whether the trespass were committed within six years or not.

LORD ELLENBOROUGH C. J. Those were actions of assumpsit, where an acknowledgment of the debt is evidence of a fresh promise; but this is an action of trespass for an injury done to the plaintiff's property. The only question is, on whom is the issue? Now the affirmative of the issue is on the plaintiff, who says that the cause of action did accrue within six years; but what proof is there that it did accrue within that time? The plaintiff has only made out that the defendant acknowledged, within six years before the

(a) *Ld. Raym.* 422.(b) *16 East*, 420.

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against
PARKER.

commencement of the action, a liability; and it is admitted that there was no promise afterwards made: he has failed therefore in proving, that the cause of action accrued within six years before the suing out of the writ; and I therefore think the nonsuit was perfectly right.

BAYLEY J. I think that there was no acknowledgment of a trespass committed within six years before the commencement of the suit.

ABBOTT J. The utmost effect of the acknowledgment is, that the plaintiff had a cause of action at that time, but he was bound to prove that he had a cause of action at a subsequent time, *i. e.* when the suit was commenced: that he has failed in proving.

HOLROYD J. By the form of the pleadings the onus probandi lies on the plaintiff: he has taken upon himself to prove that a trespass was committed within six years next before the commencement of this action; and he has failed in such proof.

Rule refused.

Saturday,
Nov. 8th.

STEEL *against* SMITH.

Where the declaration alleged that the defendant was overseer of the township of S., and it was proved that he had acted as such, and there was no evidence of overseers having been appointed for the parish of S.: Held that although the appointment was produced, and purported to be an appointment of the defendant as overseer of the parish of S., this was no variance.

Where an act of parliament, in the enacting clause, creates an offence and gives a penalty, and in the same section there follows a proviso containing an exemption which is not incorporated with the enacting clause by any words of reference, it is not necessary for the plaintiff, in suing for the penalty, to negative such proviso in his declaration.

THE first count of the declaration stated, that the defendant, on the 1st of *January* 1817, was an overseer of the poor of the township of *Stockport*, in

the county of *Chester*, duly appointed, to wit, at, &c., and thereupon the defendant afterwards, to wit, on, &c., at, &c., and during the time which he retained such appointment, did in his own name supply for his own profit divers goods, to wit, &c., of great value, to wit, of the value of 100*l.*, for the use of the workhouse of the said township for which he was and was appointed such overseer as aforesaid, against the form of the statute, &c., whereby, and by force of the said statute, the defendant forfeited for his said offence the sum of 100*l.* The second count stated, that the defendant, on the 2d of *January* 1817, was a person duly appointed in that respect, in whose hands the collection of the rates for the relief of the poor of the said township was placed by virtue of certain acts of parliament, and thereupon the defendant afterwards, to wit, on, &c. at, &c., and during the time which he retained such last mentioned appointment, did in his own name supply for his own profit certain other goods of great value, for the use of the workhouse of the township aforesaid, for which he was so appointed to hold such collection as aforesaid, against the form of the statute, &c. Third count, that the defendant was an overseer of the poor of the township duly appointed, and during the time which he retained such appointment did in his own name supply for his own profit divers goods for the maintenance of the poor of the township for which he was and was appointed such overseer, against the form of the statute, &c. Fourth count, that the defendant was an overseer of the poor of the township duly appointed, and during the time which he retained such appointment was directly concerned in supplying for his own profit divers goods for the

use

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use of the workhouse of the township for which he was and was appointed such overseer, against the form of the statute, &c. Fifth count, that the defendant was a person duly appointed in that behalf, in whose hands the collection of the rates for the relief of the poor of the township was placed by virtue of certain acts of parliament theretofore made, and during the time which he retained such appointment was directly concerned in supplying for his own profit certain other goods for the use of the workhouse of the township for which he was appointed to hold such collection, against the form of the statute, &c. Plea, nil debet.

This action was brought for penalties under the stat. 55 Geo. 3. c. 137. s. 6. (a) At the trial at the last assizes

(a) By which section it is enacted, " That no churchwarden or overseer of the poor, or other person in whose hands the collection of the rates for the relief of the poor, or the providing for the management of the poor of any parish, township, hamlet, or place, shall or may be placed, jointly with or independent of such churchwardens and overseers, or any of them, under or by virtue of any act of parliament, shall either in his own name, or in the name of any other person, supply for his or their own profit any goods, materials, or provisions for the use of any workhouse or otherwise for the maintenance of the poor in any parish, &c. for which he or they shall be appointed as such during the time which he or they shall retain such appointment, nor shall be concerned directly or indirectly in supplying the same, or in any contract relating thereto, under pain of forfeiting the sum of 100*l*. with costs, to any person who shall sue for the same in any of his majesty's courts of record at Westminster: Provided nevertheless, that if it shall happen in any parish, &c. that a person competent and willing to undertake the supply of any of the articles required for such workhouse, or for the use of the poor there, cannot be found within a convenient distance therefrom, other than except some or one of the churchwardens and overseers of the poor, or other person having the ordering, &c. of the poor in such parish, &c., then any two or more neighbouring justices of the peace, proof thereof having been first duly made before them upon oath, may by certificate under their hands and seals permit any one or more of such churchwardens and overseers, or such other person as aforesaid, to contract for the supplying of any articles which may be required for such workhouse, or otherwise for the use

assizes for *Chester* the plaintiff proved that defendant had acted as overseer, and produced in evidence the appointment of defendant; which however purported to be an appointment of the defendant as overseer (not of the township, as alleged, in the declaration, but) of the parish of *Stockport*; it appeared that *Stockport* was a parish, consisting of several townships, of which one was the township of *Stockport*, and that each township maintained its own poor separately; there was not any evidence that there had been any appointment of overseers for the parish of *Stockport*. *D. F. Jones* for the defendant objected that although if the plaintiff had relied solely on the evidence of the defendant having acted as overseer, it might have been presumed that he had been duly appointed; yet as the appointment was produced, the plaintiff was bound by that, and then there was a variance between the declaration and the evidence; for the first, third, and fourth counts of the declaration alleged the defendant to be overseer of the township; and as to the second and fifth counts, they

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use of the poor of such parish, &c. during the time which he or they may retain such appointment; and such certificate shall be entered with the clerk of the peace, or town clerk of the county, &c. in which such person shall reside, and a copy thereof left with him; and from that time every person named in any such certificate shall be discharged from any penalty to which he or they would otherwise be liable under this act for supplying any such articles or things as aforesaid; and in case any action or suit for the recovery of any such penalty as aforesaid shall be commenced against any person to whom such certificate shall have been granted as aforesaid, such person may plead generally that he was duly discharged from any liability to such penalty by a certificate granted according to the provisions of this act, and upon due proof being given of such certificate, and of such entry thereof as aforesaid, the jury shall find a verdict for the defendant, and if the plaintiff shall be nonsuited or discontinue, or if a verdict shall pass against him, or if judgment shall be had against him, on demurrer, then the defendant shall have double costs.

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were framed upon another clause in the act, which meant to provide for the case of persons, in whose hands money was placed, for the use of the poor, and who did not sustain the character of churchwardens or overseers: whereas here the defendant was overseer, and had not received any rates except in that character. The plaintiff having established the charge relating to the supply of the goods, the learned Judges directed the jury to find a verdict for the plaintiff, with liberty to the defendant to move. And accordingly

D. F. Jones moved for a rule nisi to enter a nonsuit on the ground taken at the trial; but the Court were of opinion, that as the appointment of overseers had always been for the township, and not for the parish, and as the defendant had acted as overseer for the township only, it might fairly be presumed that the word *parish* had been inserted in the appointment by mistake.

Jones then moved in arrest of judgment, on the ground that the declaration had not negatived the exception: it being a settled rule, that where in the same clause of a statute, which creates an offence and gives a penalty, there is an exception, such exception must be negatived, although it be not necessary to negative a proviso in a distinct clause; and he cited *Spieres v. Parker* (a), and *Gill v. Scrivens*. (b) Now here the exception is in the same section, and forms part of the same sentence.

Lord ELLENBOROUGH C. J. I think there is not any ground for this objection. The sense of the enacting

(a) 1 T. R. 141.

(b) 7 T. R. 27

clause is perfect and complete, and the proviso is so distinct, that several sections might have been interposed between that and the enacting clause, without any prejudice to the sense. There are not in this case any words of reference or of virtual incorporation, but this is a distinct and substantive proviso. On that ground, I think, it was not necessary for a plaintiff to notice it in his declaration.

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BAYLEY J. I am of the same opinion. I cannot say that the proviso is part of the same sentence; for if it had been omitted, the preceding sentence would have been entire. I admit that where there is an exception so incorporated with the enacting clause, that the one cannot be read without the other, there the exception must be negatived. The rule is laid down by *Treby C. J.* in *Jones v. Axon* (a), "that where the exception is incorporated in the body of the clause, he who pleads the clause ought also to plead the exception: but when there is a clause for the benefit of the pleader, and afterwards follows a proviso, which is against him, he shall plead the clause, and leave it to the adversary to shew the proviso."

ABBOTT J. There is a technical distinction between a proviso and an exception, which is well understood. All the cases say, that if there be an exception in the enacting clause, it must be negatived: but if there be a separate proviso, it need not. The sections are not numbered on the rolls of parliament. Here are not in the enacting clause any words, such as "except as

(a) 1 *Ld. Raym.* 120.

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hereinafter provided." If any such words had been introduced, it might fairly have been contended, that the subsequent proviso was incorporated with the enacting clause; and then the objection might have been supported.

HOLROYD J. The prohibition is general, and the penalty attaches upon the breach: then follows a distinct proviso, that under particular circumstances the party shall not be liable.

Rule refused.

Monday,
Nov. 10th.

ALLEN *against* SPARKHALL.

A licensed hawker opening a room in a place, he not being a householder there, and that not being the usual place of his abode, and selling there by retail, does not thereby commit an offence within the statute 50 G. 3. c. 41. s. 7. To constitute such an offence the selling must be by outcry, &c. or some mode of sale at auction.

DECLARATION stated that the defendant before the commencement of this suit (he the defendant being a hawker) did, by opening a certain room in the town of *Holt*, and by exposing to sale certain goods by retail in the said room in the said town of *Holt*, (he the said defendant not then being a householder there, and the said town of *Holt* not then being an usual place of his abode,) sell by himself certain goods, to wit, one cotton handkerchief, and one other handkerchief, contrary to the form of the statute, &c., whereby and by force, &c. the defendant became liable to pay for his said offence the sum of 50*l.*, and whereby an action hath accrued to plaintiff, &c. &c. Second count charged defendant with a similar offence, describing him as a trading person *going from town to town, and travelling with a horse*. Third count charged the defendant as a hawker, with opening a room and exposing to sale. Fourth and fifth counts were similar

to the first and second, with this difference, that it charged with selling by his servant. Plea, not guilty. At the trial before Gibbs C. J. at the last assizes for the county of *Norfolk*, the following were admitted to be the facts of the case: the defendant, a hawker and pedlar duly licensed, on the 18th *July*, 1816, opened a certain room in *Holt*, and sold therein by himself, by retail, one cotton pocket handkerchief and one other handkerchief, he the defendant not then being a householder in that town, nor such town then being his usual place of abode, but that the defendant did not sell the said goods by outcry, knocking down by hammer, candle, lot, parcel, or any mode of sale at auction, or whereby the best or highest bidder should be the purchaser. Upon these facts, the learned Judge being of opinion, that the act only prohibited sales of goods by some mode of sale at auction, nonsuited the plaintiff, with liberty to move to enter a verdict for one penalty, if the Court of King's Bench should think the sale within the act.

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Prere Serjt. now moved accordingly, and contended, that such a sale was within the 7th section of 50 G. 3. c. 41., by which it is enacted "That it shall not be lawful for any hawker, &c., either by opening a room or shop, and exposing to sale any goods, by retail, in any town, &c. such person not being a householder there, or the same not being an usual place of his or her abode, or by any other means or device, to sell either by himself or herself, or by any auctioneer, whether licensed or not, broker, appraiser, agent, servant, or other person, on his or her behalf, any
 H 3 goods,

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goods, &c. *by outcry, knocking down of hammer, candle, lot, parcel, or any other mode of sale at auction, or whereby the best or highest bidder is, or shall be deemed to be the purchaser, and that every person vending contrary to such prohibition shall forfeit 50*l.**" That this section of the statute created two distinct offences: the first, opening a room, and exposing to sale by retail, in any town, &c.; the second, vending, by outcry, knocking down of hammer, &c. &c.; each of them being equally prejudicial to the interests of the resident traders. The object of the legislature was to prevent these hawkers from entering into a competition with the permanent traders of the place. The whole clause is prohibitory, and the terms are very general, "sale by retail, or by other means or device."

LORD ELLENBOROUGH C. J. On looking at the clause, I think that the words by outcry, &c. or any other mode of sale at auction, govern the meaning of the whole. If the clause had stopped at the words "any other means or device," an argument might have been raised, but the general scope is laboriously confined to outcry and sale at auction.

BAYLEY J. There is not any general prohibition to prevent those persons from selling, but only by those means specified in the statute. Now this defendant did not adopt any of the prohibited means.

ABBOTT J. The clause is prohibitory, but the prohibition is confined to persons of a certain description. A hawker is one description of person, a person who

sells by retail is another, and neither must sell by auction.

HOLROYD J. concurred.

Rule refused.

1817.

ALLEN
against
SPARKHALL.

HARRY *against* WALL, Widow.

Tuesday,
Nov. 11th.

ASSUMPSIT by payee against maker of promissory note dated *October* 12th, 1816, payable two months after date, and for goods sold and delivered. At the trial before Lord *Ellenborough* C. J. at the *London* sittings after *Trinity* term, the defence was, that plaintiff had executed a composition deed. This deed, dated 20th *October*, 1816, was between the defendant, two trustees who were named, and the defendant's creditors, whose names were subscribed, and debts set against their names, and thereby the defendant assigned her effects to the trustees and the creditors, on receiving, on a given day at a given place, a composition of 3s. 6d. in the pound, covenanted to release her. In the beginning of *November* this deed was sent to the plaintiff to be executed, who signed, sealed, and delivered it, but upon being asked to put the amount of his debt opposite to his name, he said he could not, but desired the person who brought the deed to call again the next day; he did so, when the plaintiff refused to put any sum against his name saying that he expected the note to be paid. The plaintiff had indorsed the note on the day it was drawn to *Buckle* and Co. his bankers, in whose hands it remained till after it had become due and was dishonoured. There was no evidence that they had given any consideration for it. Beyond the amount of the note the plaintiff was a cre-

Where a creditor signs, seals, and delivers a composition deed, although he does not set the amount of his debt opposite to his name in the deed, yet he is bound by the terms of the composition to the amount of his then existing debt.

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against
WALL.

ditor of the defendant for goods sold and delivered. The composition upon the note as well as the other debt was ready for the plaintiff at the time and place stipulated by the deed. The learned Judge nonsuited the plaintiff. And now

Campbell moved to set aside the nonsuit, on two grounds: first, that the defendant never having put any sum opposite to his name the deed was never completely executed. Secondly, that at any rate it could not extend to the note then outstanding in the hands of *Buckle and Co.* the indorsees.

Per Curiam. 1. Being executed in blank, it was executed for the amount of plaintiff's debt whatever that might be. 2. Had *Buckle and Co.* been indorsees for value, they would have been creditors of the defendant for the amount of the note; but they appear to be mere agents for the plaintiff, and the defendant continued indebted to him on the note when he executed the deed.

Rule refused.

Tuesday,
Nov. 11th.

WING against MILL.

Where a pauper, residing in the parish of *A.*, received, during illness, a weekly allowance from the parish of *B.*, where he was settled: Held that an apothecary, who had attended the pauper, may maintain an action for the amount of his bill against the overseer of *B.*, who expressly promised to pay the same.

ACTION for work and labour as a surgeon and apothecary. Plea, general issue. At the trial before *Holroyd J.* at the last assizes for the county of *Leicester*, it appeared that the defendant was overseer

for

for the parish of *Silk Willoughby*, and that this action was brought by the plaintiff to recover the amount charged in his bill for professional attendance on one *Richardson* a pauper, who during twelve months' illness (induced, not by any accident, but by gradual decay,) received a weekly allowance of four shillings from the parish of *Silk Willoughby*, which was the place of his settlement; but during the whole of the plaintiff's attendance on him, he was actually resident in the parish of *Easton*, where he died. After his death, the defendant desired the plaintiff to make out his bill to the overseers of *Willoughby* parish, and said that he should be paid; and, upon these facts, a verdict was found for the plaintiff.

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 WING
 against
 MILL

Copley Serjt. now moved for a new trial. There was neither legal liability nor moral obligation to provide for the pauper while resident in *Easton*, and the subsequent promise was without consideration, and therefore nudum pactum. The poor laws are mere arbitrary enactments, and do not carry moral obligations beyond the legal liability which in this case attached on the parish which was the residence of the pauper.

Lord ELLENBOROUGH C. J. In this case both the legal and moral obligation obtain. The parish of *Willoughby* have by their weekly allowance admitted that they were bound to provide for the pauper; and the defendant, one of the overseers, after the pauper's death, expressly desires the plaintiff to send his bill made out to the overseers, and promises that he shall be paid. The case of *Watson v. Turner* (a) is decisive on

(a) *Bull. N. P.* 129. 147. 281.

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against
MILL.

the subject, and I have no doubt that the plaintiff is entitled to recover.

BAYLEY J. I am of the same opinion. If the payment of four shillings per week had not been made by the parish officers of *Willoughby, Easton* parish would have removed the pauper to the place of his settlement, and in that case the former parish must undoubtedly have provided him medical attendance. The conduct of the defendant as the overseer of *Willoughby* amounts to an acknowledgment on his part that the plaintiff had attended at the defendant's wish, and upon his responsibility. I therefore think that *Willoughby* and not *Easton* was bound to maintain the pauper, and that the promise made after his death is founded on a legal as well as a moral consideration, and therefore affords a good ground of action.

ABBOTT and HOLROYD, Justices, concurred.

Rule refused.

Sumner v. Wallis's g. to M. & L. 298

Tuesday,
Nov. 11th.

GRAY against GWENNAP.

Upon the trial of an action of tort a verdict was found for the plaintiff, subject to a reference of all matters in difference. The defendant

claimed before

the arbitrator a sum of money due to him upon the balance of an account, which was admitted by the plaintiff to be due. The award, without stating that it was made of and concerning the premises, directed a verdict to be entered for the plaintiff, with damages: Held that this award was sufficient.

AN action on the case in the nature of deceit, to which the defendant pleaded not guilty, coming on to be tried at nisi prius, a verdict was found for the plaintiff, for the damages laid in the declaration, subject to a reference.

By

By the order of *nisi prius*, all matters in difference between the parties in the cause were referred to the arbitrator, who, by his award, after reciting the order, directed a verdict to be entered for the plaintiff, with 222*4*l. damages, without stating that he made his award of and concerning the premises. By affidavit it now appeared that the cause in which the order of *nisi prius* was made was merely an action founded in tort, and that before the action the plaintiff was indebted to the defendant in the sum of 200*l.* upon the balance of an account, which was the subject of enquiry before the arbitrator, and admitted by the plaintiff to be due.

1817.

 GRAY
against
 GWENNAP.

Selwyn now moved for a rule *nisi* to set aside the award, and contended that the arbitrator having all matters referred to him had made his award as to one only, viz. that which was the subject-matter of the action, and having had the balance of account expressly brought before him, he ought to have included that also: there was therefore a matter referred on which there was no arbitrament, and consequently the award was void; and he cited *Randall v. Randall*. (a) [*Bayley J.* Does not the award mean, that the whole sum due is 222*4*l. after settling all accounts between the parties?] There is nothing on the face of the award to shew that the arbitrator has decided any thing beyond the subject-matter of the action; for he has not awarded "of and concerning the premises." If he had so done, it might perhaps be intended that he had determined all the matters submitted to him. But the present award only assesses damages to the plaintiff for the injury sustained

(a) 7 *East*, 81.

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in that action where the debt due to defendant could not have been the subject of set-off: and when the *postea* is delivered to plaintiff, he may enter up his judgment for the whole sum awarded in that action; and upon the record it will appear that such damages were assessed for the consequences of the wrongful act complained of in the declaration in that cause, that is, in a cause where the defendant, by the form of the action, was precluded from availing himself of a set-off. And if the defendant were now to bring his action for the 200*l.*, that judgment would certainly be no bar, and the award goes no further than to enable plaintiff to enter up judgment and sue out execution in that suit, and does not adjudicate on any other matter; it is therefore void, not having decided all (but only one) of the matters referred.

Lord ELLENBOROUGH C. J. I think that it sufficiently appears from the award that the arbitrator has decided concerning all the matters referred to him, by ordering a verdict to be entered for the plaintiff in the action. That he may have done so is perfectly clear, and if he had used in the award the words *de premissis*, there would be no doubt on the subject. The award recites, that all matters in difference were referred, and the arbitrator then awards a general verdict for the plaintiff, damages 2224*l.*; the fair meaning of which is, that he found that sum due after settling all accounts between the parties.

Per Curiam,

Rule refused.

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The KING *against* RICHARD SHEPHERD and
Others.

Wednesday,
Nov. 12th.

UPON an appeal against a poor rate for the parish of *Wisbech*, in the *Isle of Ely*, by which *R. Shepherd*, *J. Usill*, and *F. Stevens* were assessed 3*l.* 8*s.* for the profits of a sloop called the *John*, and *G. Patrick* was assessed 3*l.* for the profits of a sloop called the *Nene*, the sessions confirmed the rate, subject to the opinion of this Court on the following case:

The harbour of *Wisbech* is several miles up the river, and the sea or sand approaching it is so shallow that small vessels only can get up to the town of *Wisbech*, which is in the parish of *Wisbech St. Peter's*. The port of *Wisbech* comprises the river up to the harbour in the town and parish, and a portion of the bay with which it communicates. Part of the port is not within any parish, and the remainder of it is in several different parishes in the *Isle of Ely*, and the counties of *Cambridge*, *Norfolk*, and *Lincoln*. The *John* being too large to get up to the town, never was in any part of the parish of *Wisbech St. Peter's*. The usual birth of the *John* is in the bay at *Sutton Wash*, within the port of *Wisbech*, out of the parish of *Wisbech St. Peter's*, and about nine miles from the town and harbour of *Wisbech*. The words "*The John of Wisbech*" are painted on her stern, and when hailed at sea, she answers by that name. In the usual course her cargoes are unshipped from the *John* into smaller vessels at *Sutton Wash*, and frequently into vessels which have their home in the parish of *Wisbech St. Peter's*, and which are now rated in the said rate.

The owners of a coasting vessel are liable to be rated in respect of the profits accruing therefrom, in that parish where they themselves reside, and where the ship is registered, and where her cargoes are usually received and delivered and her freight paid, and which is the home of the vessel when unemployed, although at the time of making the rate the ship was not actually within the parish. But they are not liable to be rated for a ship which was never locally within the parish, although the profits be there received by the owners.

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SHEPHERD.

rate. The appellants, *Shepherd*, *Usill*, and *Stevens*, are joint owners of the ship *John*, and *Stevens* is also the master, and all of them are resident inhabitants of the said parish of *Wisbech St. Peter's*, and carry on their business there, and the said sloop is registered at the custom-house in the parish of *Wisbech St. Peter's*, where her entries and clearances are made and signed. The freight for the cargoes of the *John* are usually received by the owners at their houses in the said parish of *Wisbech St. Peter's*, and the contracts for the freights outwards are also usually made in that parish, and the smaller vessels for conveying the freights from *Sutton Wash* to *Wisbech* are provided by the owners of the ship *John* and paid for by them, and they charge for dry goods as one freight only on the delivery in the town and parish of *Wisbech St. Peter's*, and are answerable to the consignees of the goods for any loss or damage happening to the goods in their transit from the *John* to the town and parish of *Wisbech St. Peter's*, where they are delivered: but, as to coals, (the general cargoes of the *John*,) the delivery is usually at *Sutton Wash*, out of the parish of *Wisbech St. Peter's*, and where her voyage and liabilities end as to coals.

The sloop the *Nene* is a smaller vessel, and usually receives and delivers her cargoes in the town and parish of *Wisbech St. Peter's*, where her voyage terminates, but occasionally delivers goods and coals at *Sutton Wash*, out of the parish where in such cases her voyage terminates. When unemployed, her home is in the town and parish of *Wisbech St. Peter's*, where the appellant *George Patrick*, her owner and master, is a resident inhabitant, and carries on business. The sloop *Nene* is registered at the custom-house in the
parish

parish of *Wisbech St. Peter's*, where her entries and clearances are made and signed. "*The Nene of Wisbech*" is painted on her stern, and when hailed at sea, she answers by that name. The contracts for her freights outwards are usually made, and the freights inward are usually paid in the said parish of *Wisbech St. Peter's*. At the time the rate appealed against was made, the *Nene* was at *Sutton Wash*, or at sea, and not within any part of the parish of *Wisbech St. Peter's*.

The question for the opinion of the Court is, whether the said sloops *John* and *Nene*, or either of them, were or was at the time of making the said rate rateable to the relief of the poor of the said parish of *Wisbech St. Peter's*?

Upon this case being called on, the Court intimated an opinion that the *John*, never having been within the parish, could not be considered as visible property there; whereupon

Scarlett and *Hart*, in support of the order of sessions, abandoned that part of the rate, and proceeded to argue, that the owner of the *Nene* was liable to be rated in respect of that vessel, in the parish of *Wisbech St. Peter's*. That ships are rateable, has been decided in several cases. (a) Then as to the place, in what parish could this vessel be rated, if not in the parish of *Wisbech St. Peter's*? That is the place of her domicile, and all her profits in respect of which the rate is imposed are received there. As to the circumstance of the vessel being absent from *Wisbech* at the time when the rate was made, that is immaterial, inasmuch

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(a) *R. v. Jones*, 8 East, 451. and cases there cited.

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as that is the place where her cargoes are delivered, where the freight is paid, and where she contributes to the local ability of the owner, who is a resident inhabitant of the parish.

Gurney and Bevil contra, relied on the circumstance of the *Nene* not being locally within the parish at the time when the rate was made, and they cited *R. v. Howard (a)*, where an order of sessions was quashed, because it did not state that the ship was locally within the parish at the time of the rate. Non constat, but that the vessel might have been lost at that time.

LORD ELLENBOROUGH C. J. As the ship *John* was never within the parish, I cannot consider the rule by which the Court has abided in all cases, viz. that the property should be locally within the parish, as attaching upon her. That vessel has never been locally or visibly within the parish, and therefore I do not consider her as rateable. As to the *Nene*, she is said to have been out of the parish at the time when the rate was made, but I cannot say that we are to measure by a stop-watch the precise position of a ship (which is in its nature a machine of passage) at the time when the rate was made. If such strictness were required, it would be almost impossible to make a ship the subject of a rate. It appears to me to be sufficient to answer the purpose of the poor laws, that the parish in which the ship is rated is the domicile of the vessel, and that the profits derived from it contribute to the ability of the occupier within the parish. In all cases the profit

(a) 8 East, 458. n.

is earned, as to the bulk, out of the place. This vessel, as far as can be predicated of such a thing, yields a profit so as to answer the description of local and visible property within the parish. It need not be ascertained with precise exactness where the ship was at the time of the rate, in order to give validity to the rate; this parish was generally her home, and the vessel so far resided there that it could not be predicated of it, that it resided elsewhere; therefore it must be rated within that parish; it can be rated no where else. It seems to me, therefore, that the *Nene* was well rated in the parish of *St. Peter's*.

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against
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BAYLEY J. I think that the *Nene* was well rated in the parish of *St. Peter's*: it has been decided, over and over again, and too often for us to disturb it now, that if property can be shewn to be available property in the parish where the owner resides, he must be rated there in respect of such property. It is found in this case, that the owner of this vessel was an inhabitant of the parish, and also that the ship's port was within this parish: she usually received and delivered her cargo there: then, if I may use the expression, where was the property domiciled? Locally within the parish of *St. Peter's*. It has been said, that the ship might be lost at the time when the rate was imposed; but it must be recollected, that the rate is made in respect of by-gone profits, already earned at that time, and therefore the loss of the ship could not interfere with the right of the parish to receive this rate in respect of profits antecedently received.

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against
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ABBOTT J. I think the owner of the ship *John* was not rateable in respect of that vessel, inasmuch as she was never within the limits of the parish; the rule being, that the property rated must be visible property within the parish. If the Court were to depart from this rule, I think it would create great uncertainty and confusion in this branch of the law. As to the *Nene*, I think the owner was rateable in respect of that vessel, as *St. Peter's* was the parish where her cargo was usually received and delivered, and which, when unemployed, was her home. Being a coasting vessel, she would necessarily be often absent, but in the course of that employment she would often return to the parish: it may therefore fairly be said that this parish was her home, just as the dwelling-house of a person travelling on his necessary business may be said to be his home. Looking then at the general state and condition of this vessel, I think she must be considered as property locally visible within the parish, and that her occasional absence is quite immaterial.

HOLROYD J. I am of the same opinion as to both points: as to the *Nene*, the owner is rated in respect of profits, which had been earned by him, from a vessel, which, under the circumstances, must be considered as visible property within the parish. In the case of *The King v. Jones*, there was no statement that the ship was in the parish at the time of the rate being imposed; but that circumstance does not, I think, make any difference in this case, inasmuch as *St. Peter's* was the home of the vessel, and she must be considered as belonging to this parish for the purpose of being rated.

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The KING *against* The Inhabitants of
BILBOROUGH.

Wednesday,
Nov. 12th.

UPON an appeal against an order of two justices, by which *John Tilford*, his wife, and child, were removed from the parish of *Basford* in the county of *Nottingham*, to *Bilborough* in the same county, the sessions confirmed the order, subject to the opinion of the Court on the following case;

The pauper's settlement in the appellant parish having been established by evidence; it was proved that the father of the pauper subsequently made the following parol agreement with one *Willoughby Smith*: that *Smith* should teach the pauper to make stockings, during the year next ensuing, and should receive the sum of two guineas for such instruction; that the pauper should have his earnings, and pay *Smith* for the use of his frame, needles, and other utensils, and for seaming such stockings as the pauper should make. One guinea was paid at the time, and the other guinea was to be paid by instalments of a shilling a week during the continuance of the agreement. The pauper went to learn the business, and work for *Smith* in the manner specified, and continued to do so a year and a half, during which time he paid the second guinea at one shilling per week, and the stipulated price for the use of the frame, needles, and other utensils, and for seaming the stockings made: during this year and a half, the pauper resided in the respondent parish.

Where by a parol contract the master agreed to teach the pauper to make stockings during the year, for which he was to receive two guineas, and the pauper was to have his earnings, paying his master for the use of the frame, &c. and the pauper continued in the service a year and a half: it was holden that the pauper did not gain a settlement by hiring and service.

21/10/6750

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against
The Inhabi-
tants of
BILBOROUGH.

Clarke, in support of the order of sessions, was stopped by the Court.

Denman, contra, contended, that the pauper under the agreement gained a settlement by hiring and service for a year; and he relied on the *King v. Burbach*. (a)

LORD ELLENBOROUGH C. J. In this case the pauper never contracted to serve the master; the only agreement was, that the master should teach the pauper for a year. In *R. v. Burbach*, there was an agreement on the part of the pauper to work for two years; that forms an essential distinction between the two cases.

Per Curiam,

Order of sessions confirmed.

(a) 1 M. & S. 370.

Wednesday,
Nov. 12th.

The KING against The Inhabitants of ASHBY-
DE-LA-ZOUCH.

The master of several apprentices, upon his quitting business, proposed to assign all his apprentices, without mentioning either their names or number, to J. S., but no assignment was ever made; the pauper, one of the apprentices, was afterwards hired by J. S. as a servant for fifty-one weeks; and her former master, on meeting her, expressed his approbation of her having gone into the service of J. S.; the sessions having found that there was not a particular assent of the original master to the second service, and therefore the relation of master and apprentice never subsisted between J. S. and the pauper, this Court thought the sessions well warranted in that conclusion.

THE sessions, upon appeal against an order of justices, for the removal of *Ann Sutton* from the parish of *Burton-upon-Trent* to the parish of *Ashby-de-la-Zouch*, confirmed the same, subject to the opinion of this Court on the following case:

The master of several apprentices, upon his quitting business, proposed to assign all his apprentices, without mentioning either their names or number, to J. S., but no assignment was ever made; the pauper, one of the apprentices, was afterwards hired by J. S. as a servant for fifty-one weeks; and her former master, on meeting her, expressed his approbation of her having gone into the service of J. S.; the sessions having found that there was not a particular assent of the original master to the second service, and therefore the relation of master and apprentice never subsisted between J. S. and the pauper, this Court thought the sessions well warranted in that conclusion.

Wm. Mitchell 1816. 574

By

By indenture (*June 16, 1804,*) the pauper being ten years of age, was bound apprentice by the parish of *Stretton-in-the-Fields* in the county of *Derby*, until she was twenty-one, to Messrs. *Pilkinton* and *Webster*, of *Ashby-de-la-Zouch*, cotton-manufacturers, and continued to work with them in that parish until *November, 1813*, when they relinquished the manufactory and gave up business, having at that time a considerable number of female parish apprentices, who wore a particular dress in their manufactory. Previously to their relinquishing the business, *Webster* went over to *Peele*, one of the partners in another cotton-manufactory at *Burton-upon-Trent*, and proposed assigning to him the apprentices, but did not mention either their names or their number. *Peele* having agreed to take them, an application was accordingly made by *Webster* to two magistrates in order to get the assignment completed, but they objected that it could not be done without the consent of the several parish officers. *Webster* then told *Peele* that he was willing to execute as far as he had promised, but nothing further could be done than the verbal agreement before made, which was, that he *Peele* should have all their apprentices. The pauper was, at that time, with *Pilkinton* and *Webster*. About eighteen of these apprentices were sent to Mr. *Peele* at different times: with each party one of *Pilkinton* and *Webster's* servants was sent to deliver them to the overlooker of Mr. *Peele's* manufactory: with some, their indentures were sent over; with some, they were not. Many did not go to Mr. *Peele's*; but went where they pleased, and procured places for themselves. After it was found that the parish apprentices could not be formally transferred, the mother of

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Zouch.

the pauper applied to *Webster* to have her discharged, as she wished to get her a place elsewhere, and she went home to her mother, with *Webster's* knowledge and consent, and with his permission, to get a place where she pleased. When she had been at her mother's about five weeks, *Webster* called at her mother's house, and finding that she had not got into service, he recommended to the mother that she should take her to *Barton*, to *Peele's*, where she could get employment. After she had been at home about two months, the pauper went over to *Peele's* with another girl; no other person accompanied them, and they were in their ordinary dress, not that of *Pilkinton* and *Webster's* manufactory, and their indentures were not taken with them. They were both hired as servants for fifty-one weeks by the clerk or foreman of *Peele's* works, who did not know that they were apprentices, and who told them at the time that they might come into the service; but if they did, they should be hired for only fifty-one weeks. Shortly afterwards, *Webster* met the mother, and asked if the pauper was gone to *Peele's*, and was pleased at hearing she was; and afterwards meeting the pauper, he asked her where she was; and on being told that she was at *Peele's*, he said that it was the best thing she could do. In *October* last, *Webster* being applied to by one of his apprentice girls, who was at Mr. *Peele's*, for her indentures, gave them to her, and at the same time sent to the pauper at Mr. *Peele's* her indentures, which were then expired, saying, "Take them to *Ann Sutton*, for they are of no use to me." He also sent over at the same time the indentures of another girl who had been his apprentice. The pauper continued in the service

service of *Peele* until she was removed in consequence of being then with child.

The Court were of opinion that the pauper gained no settlement by the service with *Peele*, considering that the facts proved did not amount to a particular assent on the part of the original masters to the second service, and consequently that the relation of master and apprentice between *Peele* and the pauper never existed.

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Petit, in support of the order of sessions, contended, that there was not any express assent of the master to the particular service; but that the pauper was permitted by *Webster* and *Pilkinton* to go to her mother and get a place where she pleased: and then no settlement was gained, according to *The King v. Crediton*. (a) At all events this was a question for the sessions, and they have expressly determined that the facts proved did not amount to a particular assent; and this being rather a question of fact than of law, their finding is conclusive. [Lord *Ellenborough* C. J. If we do not take all jurisdiction from the sessions, their finding on this point must be conclusive. The new service was for fifty-one weeks, a different period than that for which the old service was to endure. It cannot therefore be considered as a continuance of the old service. It is a discrepant service in all its particulars.]

Peake and *Puller*, contra, contended that *Pilkinton* and *Webster's* original intention of assigning all their apprentices (of whom the pauper was one) to Mr. *Peele*, coupled with the approbation subsequently expressed

(a) 1 *East*, 59.

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The Inhabi-
tants of
ASHBY-DE-LA-
ZOUCH.

by *Webster*, on hearing that the pauper had gone to *Peele*, and the delivery of the indenture, afforded the strongest evidence of an assent to the particular service; and they cited *Rex v. Shobhear (a)*, *Rex v. Bradstone (b)*, *Rex v. St. Mary, Lambeth (c)*, and *Rex v. The Holy Trinity in the Minories (d)*, and observed that in those cases the evidence of assent to the particular service was not so strong as in the present instance.

LORD ELLENBOROUGH C. J. It has been expressly found by the sessions, that this pauper was not an apprentice, and it appears to us most clearly that the prior service was not continued; for when the apprentice applied to come into the service, she was told, that she should be hired only for fifty-one weeks, which shews that this was not a continuance of the old service. I think the facts of the case warrant the sessions in the conclusion at which they have arrived.

BAYLEY J. I am of the same opinion. It was for the sessions to draw the conclusion. They have concluded that the relation of master and apprentice did not exist, and I think they have drawn a right conclusion. The master, to whom the pauper went to be hired, was never apprised of the relation of master and apprentice having subsisted: he hired her as a servant, which constituted a new and a different relation: it seems to me, therefore, that the sessions were well warranted in drawing the conclusion, that the relation between these parties was not that of master and ap-

(a) 1 *East*, 73.(c) 2 *Bott*, 431.(b) 2 *Bott*, 434.(d) 3 *T. R.* 605.

prentice;

prentice; and if it were not, then the service of the pauper could not confer a settlement.

ABBOTT J. I am of the same opinion. The sessions have drawn the only conclusion which persons of a sound understanding could have drawn from the facts stated.

HOLROYD J. concurred.

Order of Sessions confirmed.

WATSON and Another *against* MEDEX.

THE plaintiffs had sold to the defendant two parcels of goods at two different times, for the amount of which they had taken upon each sale a bill of exchange payable to them or order. The defendant afterwards becoming bankrupt, the plaintiffs proved under the commission for the amount of the first parcel of goods, for which they still held the bill of exchange. The other bill was at that time in the hands of a third person, having been negotiated by the plaintiffs prior to the bankruptcy, but shortly after the plaintiffs had proved it was returned to them dishonoured; whereupon they arrested the defendant for the amount of the parcel of goods for which that bill had been given. *Schwyn* moved to stay the proceedings, on the ground that the plaintiffs having made their election to proceed under the commission for a part of their demand, could not since the passing of the

not precluded by the stat. 49 G. 3. c. 121. s. 14. from suing the bankrupt of the last parcel of goods. *and see Br. 1401. v. Malt. & Bury M.*

49 G. 3.

1817.

The King
against
The Inhabitants of
ASHBY-DE-LA-
ZOUCH.

Thursday,
Nov. 13th.

Two parcels of goods were sold at different times, and paid for by bills; the vendee afterwards becoming bankrupt, the vendors proved under the commission, for the amount of the first parcel, they then holding the bill given in payment for the same; the bill for the other parcel having been negotiated by them prior to the bankruptcy, and being then outstanding was afterwards dishonoured: Held that the vendors were for the amount

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against
MEDEX.

49 G. 3. c. 121. s. 14. (a) proceed at law for the remainder; and he cited *Exp. Dickson* (b) and *Exp. Harndenburgh* (c), in the last of which cases the Lord Chancellor says, "Before the late act, if your debts were of a different right or of a distinct nature, you might come in under the commission for one, and proceed at law for the other; but the act has now settled that." The Court granted a rule nisi; and now *Marryat* shewed cause, and contended, that the election to take the benefit of the commission was confined to the debt proved.

LORD ELLENBOROUGH C. J. I think that by the letter of the statute the election must be confined to the debt proved.

BAYLEY J. The commissioners would not have allowed the plaintiffs to prove the other debt. As to that debt, at the time of the bankruptcy, they had not a complete right vested in them. The plaintiffs prove for all they could prove, and it depended entirely upon accident whether they could ever be in a situation to prove for the other demand.

ABBOTT J. There is a manifest difference between the language of the two parts of this section; the first part enacts "that the creditor who has brought any action in respect of any demand which arose prior to the bankruptcy, or might have been proved as a debt, shall not

(a) By which it is enacted, that it shall not be lawful for any creditor who has brought any action against the bankrupt in respect of a demand which arose prior to the bankruptcy, or which might have been proved as a debt under the commission, to prove a debt under such commission, &c. without relinquishing such action, and that the proving or claiming a debt under such commission shall be deemed an election by the creditor to take the benefit of the commission with respect to the debt so proved or claimed.

(b) 1 *Rose's Cases in Bankruptcy*, 98.

(c) *Id.* 204.

prove a debt under such commission, or have a claim of a debt entered upon the proceedings, without relinquishing such action." Upon this part of the section the decision by the Lord Chancellor in *Exp. Dickson* took place. The second part of the section says, that "the proving or claiming a debt under a commission shall be deemed an election by such creditor with respect to the debt so proved or claimed;" thereby, as it appears to me, tying up the election, and confining it to the particular debt so proved or claimed.

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WATSON
against
MEDEL.

HOLROYD J. I am of the same opinion. As both these debts were incurred before the bankruptcy, the plaintiffs might have recovered the whole in one action of indebitatus assumpsit; but as far as respects the question before us, I think this case differs from the case of a debt arising out of one entire contract, inasmuch as the plaintiffs could only prove one debt and not the other, and then the statute does not operate except as to such debt so proved, and as to that only.

Rule discharged.

Cum gratia . . . Bedfordshire. 18th Nov. 1818.

DENBY against MOORE.

Friday,
Nov. 15th.

ASSUMPSIT for money had and received. Pleas, first, the general issue, and secondly, the statute of limitations. At the trial before *Bayley J.*, at the last summer assizes for the county of *York*, it appeared in evidence, that the plaintiff for ten years before, and also upon the 8th day of *March*, 1816, had been, and was occu-

An occupier of lands having, during a course of twelve years, paid to the collector of taxes the landlord's property tax, and the full rent as it became due to the landlord,

without claiming any deduction on account of the tax so paid: Held that the occupier could not recover back from the landlord any part of the property-tax so paid.

per

1817.

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DENBY
against
MOORE.

pier of a messuage and farm, situate at *Cowick*, in the parish of *Snaith* in the county of *York*, and rated to the property-tax for the same. Although the plaintiff occupied the farm, one *George Craven*, the father-in-law of the plaintiff, was the tenant to the defendant, but the plaintiff paid the rent for some years before *Craven's* death, which happened in *November, 1812*; though defendant would not allow him as his tenant, but would only give receipts to *Craven*. After *Craven's* death, plaintiff, who was his executor, paid the rent until the 2d *February, 1815*, when plaintiff and defendant agreed for the farm on a tenancy, under which plaintiff himself was to be tenant to the defendant. The defendant received the full amount of his rent from the hands of the plaintiff, as and when the same became due, for the said premises so situate in *Cowick* aforesaid, without deducting or allowing for the landlord's property-tax charged upon the same, although the same had been and was duly paid by the plaintiff as such occupier, to the proper collector thereof in that behalf appointed, from time to time as the same became due, up to the end of the assessment in 1814.

No demand of, or application or request for the said property-tax, to be paid or allowed or deducted out of the rent, was ever made at the time of payment of any rent as aforesaid, nor was any receipts from any collector ever produced, but the same was paid to the defendant until the 13th *March, 1816*. On the 13th *March, 1816*, the plaintiff paid to the defendant 112*l.* 10*s.* for half a year's rent which had become due on the 2d *February, 1816*; and at the same time demanded
the

the landlord's property-tax for the said premises for the last twelve years, and afterwards for the last six years, but did not then or at any other time produce any collector's receipt for the same, and that the defendant then and there refused to repay or allow the same or any part thereof, saying at the same time, that he never had allowed, nor ever would allow any property-tax, and the full rent without any deduction for property-tax was then paid; but the defendant afterwards offered to pay the plaintiff the property-tax for the rent of 112*l.* 10*s.* then payable.

On the 17th *February*, 1815, the plaintiff and defendant settled all accounts then subsisting between them, and the defendant then paid to the plaintiff 106*l.* 9*s.* 1*d.*, and the plaintiff then said to him, "Now you and I have settled all accounts, both as executor and on your own account, and there is nothing more between us." Defendant said, yes. The plaintiff proved no assessments later than for 1814. The plaintiff was the collector of the property-tax for the district in which the premises are situate for two years preceding 1814. The jury gave a verdict for the plaintiff, damages 66*l.*, subject to the opinion of the Court, whether the plaintiff was entitled to recover for any part of the claim. If the Court shall be of opinion that the plaintiff is entitled to recover for the whole twelve years, then the present verdict to stand; if only for six years, then the verdict to be reduced to 43*l.* 11*s.* 9*d.*; if they shall be of opinion that the plaintiff is not entitled to recover any thing, then a nonsuit to be entered.

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 against
 MOORE.

Barrow,

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against
MOORE.

Barrow for the plaintiff argued that where a man pays money for another, who is under a legal obligation to pay the same, assumpsit will lie; and he cited *Moses v. Macferlan* (a), and *Jenkins v. Tucker* (b); the landlord in this case being bound to allow the property-tax to the tenant, and the latter paying it only to save his goods from being distrained, this must be considered as a payment by compulsion; and *Graham v. Faith* (c) is a decisive authority, that in such a case money had and received, is the proper form of action.

Littledale for the defendant. Between these parties, the relation of landlord and tenant never existed, and as between them there was no privity; the plaintiff must consequently seek his remedy against the person for whom he was agent, and on whose account he paid the property-tax, *i. e.* the original tenant. [The Court here intimated a strong opinion, that the fact of the defendant's having received the plaintiff's money, was sufficient to enable him to maintain this action,] *Littledale* abandoned this ground; and contended, that by the 46 G. 3. c. 65. *Sched. A. no. 4. rule 9. (d)*, the plaintiff was deprived of this remedy. The act having pointed out a specific mode of redress, *i. e.* by deducting the tax out of the next rent, the tenant

(a) 2 Burr. 1009.

(b) 1 N. R. 90.

(c) 1 M. & S. 610.

(d) "The occupier or occupiers of any land, &c., being respectively tenants of the same, and paying the said duties, shall deduct so much thereof, in respect of the rent payable to the landlord, as a rate of two shillings for every twenty shillings in the pound would amount to, which sum shall be deducted out of the first payment thereafter to be made on account of rent, and all landlords, &c. shall allow such deductions and payments upon receipt of the residue of the rent, and the tenants shall be discharged of so much money as if the same had been paid to the person to whom the rent was due.

ought

ought to have adopted it; and having neglected so to do, he cannot avail himself of the common remedy by action; and inasmuch as the statute provides that the tenant shall be discharged of as much rent as the property-tax amounts to, the subsequent payment of that which ought to have been deducted as property tax, was a voluntary payment; but if that were not so, this is an agreement, which if carried into effect will operate as a fraud upon the revenue, and will contravene the object of the act; for the landlord is to pay two shillings in the pound upon his rent, and the tenant seven and a-half per cent. upon the amount of his rent; and supposing the tenant to pay a clear 100*l.* to his landlord, and 10*l.* to government, that is an admission of the tenant that the real rent is 110*l.*; and in that case the revenue ought to receive 11*l.* instead of 10*l.*; and if the rent reserved in the lease was 100*l.*, and not 110*l.*, the tenant's tax would vary in the same proportion; the revenue would therefore be defrauded both in the landlord's and in the tenant's tax. In the course of his argument he referred to *Tinckler v. Prentice* (a), and *Clenell v. Read*. (b)

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 against
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Barrow in reply. The tenant is permitted by the statute to deduct the tax out of the first rent, but this provision is for the benefit of the tenant, and not imperative on him; and the common law remedy (not being expressly taken away by the statute) remains. The amount of this tax then having been paid for the landlord, who was under a legal obligation to allow it, it may be recovered back in this form of action.

(a) 4 *Tenat.* 349.(b) 2 *Marsh.* 371.

Lord

1817.

 DENBY
 against
 MOORE.

Lord ELLENBOROUGH C. J. I think in this case the action is not maintainable. The plaintiff was certainly warranted in the payment which he at first made in redemption of his goods, which, but for such payment, might have been distrained upon. But when he went with the money for the purpose of paying to his landlord the next rent which became due he ought to have then made the deduction. This, however, he did not choose to do, but paid the sum of 10*l.* more than was necessary. It was therefore quoad that sum a voluntary payment on his part. It does not appear what might be the reasons which induced him so to act, but it was a voluntary payment. Whether the transaction between him and the landlord was fraudulent with respect to the property tax is perhaps not clear. I, however, go on its being a voluntary payment, and I know of no principle of law which gives him a right to recover back money so paid. It was his own voluntary act which placed him in the situation in which he now stands.

BAYLEY J. On the discussion I am satisfied that this action cannot be maintained. The payment was made at a time when it was in the tenant's power to have deducted the sum in question. He must have known that he had a right so to deduct it. Knowing this, he chooses nevertheless to make this payment. Then that is a voluntary payment which he cannot recover back by this action. But I think also, that he cannot recover for another reason. This was a fraud on the property-tax act. If the tenant had insisted on deducting the tax from the next rent that became due, the landlord might and probably would have raised the

rent. And it seems to me, that the clause in the act of parliament enabling the tenant so to deduct it was framed with this very view, viz. that the most improved rent for the land might thus be obtained, and be the sum on which the tax is payable; but if the tenant be allowed not to deduct immediately, but to go on paying for many years, and then to call on the landlord to repay him altogether, that will have a tendency to defraud the revenue. The tenant will thereby have a great advantage. If he does not as in the case before the Court, deduct the 10*l.* it is an admission on his part, that the land which is let to him for 100*l.* is worth 110*l.* But if so, the government ought to have received 11*l.* per annum, and not 10*l.* which they have done. And therefore on this ground also, I think this action not maintainable.

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against
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ABBOTT J. The intention of the legislature was, that this tax should fall entirely on the landlord, and the act provides, that the tenant at the first payment shall have an opportunity of deducting the amount of the tax he had so paid for his landlord, and to prevent his being oppressed by the landlord, the latter is subject, by section 115., to very heavy penalties in case of refusal; and all contracts made for payment of the rent in full, without allowing such deduction, are utterly void. As soon therefore as the tenant has paid the property-tax, I consider it in effect as a payment by him of so much of the next rent due by him to his landlord. But if it had been the intention of the legislature that a tenant should go on for years paying the tax without claiming any deduction from the landlord, and then be permitted to deduct the whole amount at once, I can-

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 against
 MOORE.

not help thinking there would have been found in the property-tax act some clause to that effect. The case then stands thus: either the tenant must be considered as having given so much money to his landlord; and if it be so, then he cannot recover back money which he has so parted with; or he must be taken to admit, that the rent he paid for the land was less than the value which he ought to have paid, and then he would be a party to a fraud on the government in paying less property-tax than he ought. I therefore think he cannot recover in this action. I do not say, however, that the clause giving the power of deduction takes away all other remedies. There may be cases suggested in which a tenant might recover, as if he had not his property-tax receipts with him at the time when he makes the next payment of rent, and the landlord, on being applied to immediately afterwards, should refuse to pay back the money.

HOLROYD J. This action cannot be supported: if it could, it would countervail the provisions of the property-tax act. The tax of two shillings in the pound is laid on the property of the landlord. The effect of enabling the plaintiff to recover in this action would be to throw that tax on the occupier. This is an action for money had and received. The first payment of the tax by the occupier is a lawful payment: he had a right to pay it in the first instance, and needed not to wait till his property had been distrained upon before he did so. The statute directs that the tenant shall deduct the money from his next rent. Then that money is as so much rent already paid to the landlord. If the tenant afterwards chooses to pay the whole rent, it must be a

voluntary payment on his part as to the portion paid by him before. I therefore think that being a voluntary payment he cannot recover it back by this form of action.

1817.

—
DENBY
against
MOORE.

Judgment of nonsuit.

GRAHAM and Another *against* ALEXANDER
 HENRY, ROBERT HENRY, and MAURICE
 WEST.

Thursday,
Nov. 13th.

MARRYAT on a former day obtained a rule to shew cause why the judgment of outlawry as to the defendant *Robert Henry*, should not be reversed on his paying the costs of the outlawry, and putting in bail in the action, ~~and~~ paying the condemnation-money, or rendering himself into the custody of the marshal. It appeared from the affidavit in support of the rule, that the three defendants were partners in trade, and that the defendant *Robert Henry* before, and at the time of, and since the outlawry until the month of *June* last, resided in *Jamaica*; that in the year 1810 the plaintiffs commenced the present action against the three defendants, and obtained judgment of outlawry against *Maurice West* and *Robert Henry*, and recovered against the other defendant *Alexander Henry*, who afterwards becoming bankrupt, the plaintiffs' judgment remained unsatisfied; that in the month of *June* last, this defendant came to this country, and was, upon his arrival, arrested at the suit of the plaintiffs, upon a *capias* ut lagatum.

The defendants need not appear before he moves to reverse an outlawry, and where he did not go or continue abroad for the purpose of avoiding process, the Court will, on motion, reverse the outlawry, and order the recognizance to be taken in the alternative, and not for the payment of the condemnation-money absolutely.

1817.

GRAHAM
against
HENRY.

Gurney and *Taddy* now shewed cause. The defendant must appear before he moves to reverse the outlawry; and they cited *French v. Moore* (a), and *Tidd's Practice*, p. 140., and *Sumerville v. Watkins* (b); and they said that this differed from a case where there are not any other defendants; here the plaintiffs have proceeded against the others, and have been greatly delayed by the non-appearance of this defendant. If, however, the Court reverse the outlawry, it must be on the terms of the recognizance, being taken absolutely for payment of the condemnation-money; and they cited *Matthews v. Gibson* (c), where *Lawrence J.* said, "that though the practice formerly was to take the recognizance of bail in the alternative, yet that now it was settled to be taken to pay the condemnation-money only."

Marryat in support of the rule. Though it be laid down in *Tidd's practice*, that an outlawry cannot be reversed till the defendant has appeared, yet that proposition cannot be supported, for until the judgment be reversed, no writ exists to which the defendant can appear; and he cited *Hesse v. Wood*. (d) Secondly, It is in the discretion of the Court to say, whether the recognizance is to be taken absolutely, or in the alternative. In *Graham v. Grill* (e), this Court, and in *Hesse v. Wood* (f), the Court of Common Pleas, reversed the outlawry, upon the defendant's putting in bail in the alternative, and as it is not alleged that this defendant absented himself for the purpose of avoiding

(a) *Tidd's Prac.* 140.(c) 8 *East*, 527.(e) 1 *M. & S.* 409.(b) 14 *East*, 536.(d) 4 *Taunt.* 694.(f) 4 *Taunt.* 691.

process,

process, the Court will reverse the outlawry upon the usual terms, *i. e.* upon the defendant's putting in bail in the alternative.

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GRAHAM
against
HENRY.

LORD ELLENBOROUGH C. J. I do not see how the defendant can appear to a writ which is now expired. The only question is, as to the terms on which the outlawry ought to be reversed, for this is a case in which the Court may exercise its discretion: it appears that the outlawry took place in the absence of the defendant; if a writ of error therefore had been brought, the outlawry would be reversed as of course. I think that under these circumstances, the Court ought to direct the recognizance to be taken in the alternative, the defendant not having absented himself to avoid process.

BAYLEY J. It is not stated, or even insinuated, that this defendant went abroad or continued there, for the purpose of avoiding process.

ABBOTT J. It is quite clear that the defendant would be entitled to reverse this outlawry upon writ of error; the Court may exercise the same power upon motion, and they may in their discretion direct in what form the recognizance should be taken; and I think that it should be in the alternative.

Rule absolute.

1817.

Friday,
Nov. 14th.

GRANT *against* HULTON and Others.

A gamekeeper was authorized by his deputation to seize greyhounds, setting-dogs, ferrets, and to do all things belonging to the office of gamekeeper, according to the directions of the acts of parliament: Held that he was not thereby authorized to seize hounds.

TRESPASS for beating and crippling plaintiff's dogs. 2d Count, for seizing dogs. Plea, not guilty. 2d, Justification by one of the defendants, as gamekeeper of the lord of the manor, under a deputation by which he was appointed gamekeeper, with full power and authority, according to the directions of the statutes in that case made and provided, among other things, to seize all such greyhounds, setting-dogs, ferrets, trammels, hays or other nets, snares or engines for the taking, killing, or destroying hares or other game, as within the precincts of the manor should be kept or used by any person not legally qualified to keep or use the same, and further to do all things which belonged to the office of a gamekeeper, according to the directions of the said acts of parliament; and because the dogs were trespassing on the manor, one of the defendants, as such gamekeeper, and the other defendants in his aid and by his command, seized the said dogs, &c. Replication, de injuria, &c.

At the trial before *Bayley J.* at the last spring assizes for the county of ~~York~~, it was objected, that the deputation did not authorize the gamekeeper to seize hounds, but only the species of dogs therein mentioned. The learned Judge, however, directed the jury to find a verdict for the plaintiff, with liberty to the defendant to move to enter a nonsuit. A rule nisi for that purpose having been obtained by *Raine*, in *Easter* term last,

Scarlett

Lancaster

Scarlett and *Richardson* now shewed cause. The deputation set out in the pleadings is sufficient to authorize the gamekeeper to seize these dogs, being hounds; for though that species of dog is not expressly named, still as the authority is to do all things belonging to the office of a gamekeeper, according to the directions of the acts of parliament; and as by the very words of the statute 22 & 23 Car. 2. c. 25., a gamekeeper, being thereunto authorized by the lord of the manor, may seize all guns, bows, greyhounds, setting-dogs, lurchers, or other dogs to kill hares or conies, &c. &c., it follows that it belonged to the gamekeeper's office to seize hounds (they being dogs to kill hares), and that he was well authorized for that purpose by the concluding sentence of the deputation.

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GRANT,
against.
HULTON.

Raine and *J. Williams*, contra. Assuming that the words of the statute, "other dogs to kill hares," are sufficiently large to enable the lord of the manor to authorize a gamekeeper to seize hounds, yet here the deputation only mentions dogs of a specific description, without adding, "other dogs to kill hares." If then the deputation had not contained any other general words, it is clear, that the gamekeeper could only be warranted in seizing dogs of the description there specified. The concluding words, "authorizing the gamekeeper to do all acts belonging to his office," must refer to acts different from the seizing of dogs; which was before distinctly mentioned; such as the seizing of guns. If it were intended by these general words to authorize him to take all dogs, what necessity was there for distinctly describing the species in the former part of the instrument? And upon the principle that *expressio unius*

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 HULTON.

exclusio alterius, it must be inferred that the legislature meant to confine the gamekeepers' power of seizing dogs to such as were expressly mentioned in the statute.

ABBOTT J. The 2d section of stat. 22 & 23 Car. 2. c. 25. directs that all lords of manors may authorize their gamekeepers "to seize guns, bows, greyhounds, setting dogs, lurchers, or other dogs to kill hares or conies, as within the precincts of such respective manors shall be used by any person who by this act is prohibited to keep or use the same." This section, therefore, does not give a general authority, but an authority to be exercised against such persons "who are by this act prohibited to keep, or use the same." We must look farther, therefore, to see what the prohibition is, and for that purpose we must look to the third section, which declares "that all persons not having lands of inheritance of 100l. per ann. &c. are persons not allowed to keep any guns, bows, greyhounds, setting dogs, ferrets, coney dogs, lurchers, hays, nets, &c., but are prohibited to keep or use the same." This section then contains no prohibition against keeping or using hounds. The gamekeeper, therefore, was not authorized under this act of parliament (which alone applies to this question) to seize hounds. In *Hooker v. Wilkes* (a) it was held, that a hound was not within the statute 5 Ann. c. 14.

Per Curiam,

Rule absolute:

(a) 2 Stra. 1126.

1817:

DOE, on the several Demises of S. WOLFE, W. WETTON and JULIANA his Wife, J. KNIGHT and MARY his Wife, JOHN MYATT, ISAAC ANDERSON, J. WILSON and SUSANNAH his Wife, and SARAH MARE, *against* ALLCOCK.

Tuesday,
Nov. 18th.

EJECTMENT to recover one third part of premises at *Standon* in the county of *Stafford*. The declaration contained counts on the joint and several demises of the respective lessors of the plaintiff, on the 15th of *May*, 1816. Plea, the general issue. At the trial at the last summer assizes, the jury found a verdict for the lessors of the plaintiff, subject to the opinion of the Court on the following case:

John Thorley being seised in fee of the premises in question, by will (13th *March*, 1799) devised the same in the following words: "I devise all my hereditaments in *Standon*, in the county of *Stafford*, unto my sister *Elizabeth Thorley*, and to her daughters, *Ann Shaw* the wife of *David Shaw*, and *Frances Thorley*, their heirs and assigns, equally to be divided between and amongst them, share and share alike, as tenants in common and not as joint tenants, for and during the life of my said sister *Elizabeth Thorley*; and from and immediately after her decease, then I devise the said third part of the aforesaid hereditaments so devised to my said sister *for her life* as aforesaid, unto her said two daughters, *Ann Shaw* and *Frances Thorley*, their heirs and assigns for ever, equally to be divided between them, share and share alike, as tenants in common and not as joint tenants."

A. devised all his hereditaments to his sister *B. T.* and to her daughters *A. S.* and *F. T.*, their heirs and assigns, equally to be divided between them as tenants in common, for and during the life of *B. T.*; and after her death he devised the third part "so devised to his sister for her life as aforesaid," to *A. S.* and *F. T.* in fee: Held that all the estate passed under this will, and that the daughters *A. S.* and *F. T.* took a fee in two-thirds, with a remainder in fee in the other third part after the death of the mother.

John

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John Thorley died on the 21st of *September*, 1802, without having revoked his will, leaving two sisters his coheirresses at law, him surviving, namely, the said *Elizabeth Thorley* mentioned in the said will, and *Mary* the wife of *John Mare*.

Frances Thorley afterwards intermarried with *John Alcock*, and in *Michaelmas* term, 1807, *Elizabeth Thorley*, *David Shaw* and *Ann* his wife, and *John Alcock* and *Frances* his wife, levied a fine sur conuzance de droit come ceo, &c., with proclamations of the premises, and declared the uses as to one moiety to the joint appointment of *Shaw* and wife, and in default thereof to *Shaw* and wife and the survivor, and the heirs and assigns of such survivor, and as to the other moiety, to *Alcock* and wife in the same manner. By deeds of lease and release (23d and 24th of *March*, 1816), *Shaw* and wife in consideration of 1800*l.* appointed the premises to *Alcock* in fee.

John Mare and *Mary* his wife died prior to 1809, leaving seven daughters then surviving coheirresses of the said *Mary*, namely, *Elizabeth* married to *Samuel Woolfe*, both now deceased, whose son and heir *Samuel Woolfe* is one of the lessors of the plaintiff; *Juliana*, one other of the lessors of the plaintiff; *Mary*, one other of the lessors of the plaintiff; *Ann*, now deceased, married to *John Myatt*, one other of the lessors of the plaintiff, and who is tenant by the curtesy of *England*, of all the real estates which belonged to the said *Ann*; *Hannah*, now deceased, married to *Isaac Anderson*, one other of the lessors of the plaintiff, who is also a tenant by the curtesy of all the real estates which belonged to the said *Hannah*; and *Susannah*, and *Sarah*, the other two lessors of the plaintiff. The said *Elizabeth Thorley* died

died on the 10th day of *May* in the year 1816, and during her life, and before the day of the demise laid in the declaration, viz. on the 19th and 20th *May*, 1815, the lessors of the plaintiff, in due form, made an entry on the premises in question to avoid all fines before then levied thereof. The defendant then and from thenceforth continued to be in possession of the said premises. The question for the opinion of the Court is, whether the lessors of the plaintiff be entitled to recover one third part of the premises devised as aforesaid by the will of the said *John Thorley*. If the Court should be of opinion that the lessors of the plaintiff are so entitled, then the verdict is to stand as entered; but if the Court should be of opinion that they are not so entitled, then a nonsuit is to be entered.

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W. E. Taunton, for the lessors of the plaintiff, contended that the estates which passed by the devise to *Elizabeth Thorley's* daughters, their heirs and assigns, were estates pur autre vie, for the life of *Elizabeth Thorley*, as tenants in common, with a remainder in fee to them as tenants in common in one-third, leaving two-thirds to descend to the testator's heirs; the consequence of which construction was, that as to two-thirds the testator died intestate, and then the lessors of the plaintiff, who represented one of the coheirresses, would be entitled to half of that of which the testator so died intestate, that is, one third of the whole. It is a general rule that the heir is not to be disinherited except by express words, or by necessary implication. From the subsequent devise in fee to the daughters of the one-third, it will be argued that the testator intended to dispose of the whole of his property; but that

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that is an extremely doubtful and conjectural construction. There is nothing appearing on the whole of the will taken together, from which it can be inferred that it was the clear and undoubted intention of the testator to dispose of the whole of his property. The words "during the life of my sister *E. Thorley*" must of necessity qualify the degree of interest given to the daughters; for if those words are to be taken as respecting the period of division only, the two daughters will be tenants in common in two-thirds of the estate only during the life of the mother, which could not have been the intention of the testator, inasmuch as when he devises over the one-third given to the mother, he says that the daughters shall take that as tenants in common, and not as jointenants.

Preston, contra, was stopped by the Court.

LORD ELLENBOROUGH C. J. If we begin at the last part of this will, we shall find a clue that will guide us in the explanation of the whole. Nothing is more clear than that the testator intended to give his sister *Elizabeth* an estate for life in one-third, and that after her death the one-third part, *so devised to her for life*, should go to the daughters in fee; then as to the remaining two-thirds, there are words competent to give the daughters an estate in fee in that part of the estate. The testator has thrown together a heap of words, the sense and meaning of which he did not clearly apprehend; but although the language of this will is confused, and the words are scattered in such a way as if taken in the order in which they stand, they do not convey any meaning; yet in favour of common sense,

sense, we may take the liberty of transposing them according to that order which we may fairly suppose the testator would wish to have adopted, and by which we can best effectuate his intention. The labour of the argument has been to make the testator dispose of only one-third of his estate, and thereby to compel an intestacy as to the remainder; whereas, his meaning evidently was to dispose of the whole.

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ABBOTT J. (a). I am of the same opinion. The argument of the learned counsel for the plaintiffs rejects altogether the meaning of the testator. According to his construction, the consequence would be this, that the daughters, after the death of the mother, would have just half as much as they would have during her life time,

HOLBOYD J. - If this will is taken by parts, I think we shall be able to carry the testator's intention into effect: First, he devises the premises to *Elizabeth Thorley*, then he goes on, "and to her daughters, their heirs and assigns." From a subsequent part of the will it appears that the estate here devised to *E. Thorley* was an estate for life in one-third part of the premises; the daughters, therefore, would take a fee in the remaining two-thirds. The will then proceeds thus: "equally to be divided between them as tenants in common, and not as joint tenants, for and during the life of *E. Thorley*:" these words shew how the estate was to be enjoyed by the mother and daughters during the life of the mother, namely, as tenants in common; and lastly, the testator gives a remainder in fee to the

(a) Bayley J. was absent.

daugh-

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daughters in that part of the estate which he had before devised to *E. Thorley* for her life. By reading the words "to be divided between them as tenants in common during the life of *E. Thorley*" as in a parenthesis, the whole is made clear and intelligible. By this construction the testator disposes of the whole; but it has been said, that this will have the effect of making the daughters tenants in common in the two-thirds only during the life of the mother, and that this was not in the contemplation of the testator; but there is nothing to shew that he intended that they should be tenants in common in the two-thirds after her death. And if the words "for and during the life of *E. Thorley*" were to be considered as restraining and qualifying the interest which the daughters were to take, the clear intention of the testator would be altogether defeated; for it is manifest, that he never intended to die intestate, as to any part of the property.

Judgment of nonsuit. (a)

(a) See *Dec d. Willis v. Martin*, 4 T. R. 39.

Tuesday,
Nov. 18th.

EVERTH and Another against TUNNO.

A ship was permitted by a licence to proceed from *D.* to *L.*, and thence to *B.*, there to load to the destination of the port from which she departed. The vessel proceeded on her voyage from *D.* to *L.*, and from *L.* to *B.*: Held that she was not protected by the licence on a further voyage from *B.* to *L.*

ASSUMPSIT upon a valued policy of insurance, subscribed by the defendant, and effected by the plaintiffs as agents for *Dubois and Co. of Dantzig*, owners of the ship, upon ship and freight. The voyage insured was at and from *Bordeaux to London*, war-

ranted

ranted with a *British* and *French* licence. At the trial before Lord *Ellenborough* C. J. at the *London* sittings after *Michaelmas* term, 1816, a verdict was found for the plaintiff, subject to the opinion of the Court upon the following case :

The ship sailed from *Dantzig* for *London* in the month of *October*, 1811, and previous to her sailing *Dubois* and Co. procured the following licence, which was granted by *Napoleon* as Emperor of the *French*, and the material parts of which were as follow :

Valid for one voyage only, including the going and returning. We do authorize, by the present special licence, the *Dantzig* ship *Winthout* to set sail and depart from the port of *Dantzig*, and proceed to the destination of *London*, without her being in any manner liable to any hinderance to the going out, to the navigation, and to the entrance of the said ship. We understand, first, that the said ship may, on departing from the said port, be loaded with grain, flour, and other produce and merchandize of the soil, of which the export is not prohibited. 2dly, That the said ship shall have the liberty either to come back direct, and in ballast, into the port of departure, or, after having sold her cargo of grain, to enter into one of the ports of *Nantz* or of *Bordeaux*, either in ballast or with a cargo consisting of certain articles specified in the licence. 3dly, That she may load in the ports of *Nantz* or *Bordeaux*, and to the destination of that from which she departed, silks, wine, brandy, cloth, and other produce of *French* soil and industry. Be it finally understood, That the said ship shall not navigate to any other destination than those precedingly indicated.

With

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against
TUNNO.

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against
TUNNO.

With this licence the ship sailed from *Dantzig*, and arrived in *London*, where she remained till *February*, 1813. A *British* licence was obtained, and a charter-party entered into, which are immaterial with reference to the point on which the Court ultimately pronounced their judgment. The vessel then sailed from *London*, and arrived at *Bordeaux* in *March*, 1813, with the *French* licence on board, and the latter end of *April* was seized by the *French* government. On the 25th *June*, 1813, the plaintiffs, by notice in writing, abandoned to the defendants and the other under-writers on policy the ship and freight, and demanded payment as for a total loss.

The question for the opinion of the Court is, whether the plaintiffs are entitled to recover; if the Court should be of opinion that they are entitled to recover, the verdict to stand; if they are not entitled to recover, a nonsuit is to be entered.

Taddy, for the plaintiff. The warranty in the policy that the ship should have a *French* licence has been complied with, and although that licence is to continue in force for one voyage only, including the going and returning; still as it authorised the ship to go from *Dantzig* and to proceed to the destination of *London*, and by the second clause the ship is to have liberty to go to the port of *Bordeaux*, where, according to the third clause, she may load and proceed to the destination of that from which she departed, it is clear that the licence contemplated *London* as the port of destination from which she last departed. The *French* government had three objects in view; first, not to import into their own country the produce of *English* industry; secondly,

to import naval stores into *France* ; lastly, to export to *England French* produce. By construing the licence so as to protect the voyage from *Bordeaux* to *London*, the Court will be giving effect to that which appears to have been the manifest object and intention of the licence.

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Gurney, contra. The question depends entirely upon one line in the licence, viz. "valid for one voyage only, including the going and returning." If there be any ambiguity in the third clause of the licence, this fully explains it; it shows distinctly that the voyage was to commence and conclude at *Dantzic*. He was then stopped by the Court.

LORD ELLENBOROUGH C. J. The terms of the licence, "for one voyage *only*, including the going and returning," are decisive of this question. When the licence speaks of the port from which the vessel departed, generally, it must mean the port from which the ship originally departed in the commencement of her voyage. *Dantzic*, therefore, was the terminus a quo, and the terminus ad quem, it was the port of departure and the port of ultimate destination.

Per Curiam,

Judgment of nonsuit.

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Tuesday,
Nov. 18th.

NESHAM and Others *against* ARMSTRONG and
Another.

In an action on the stat. 52 G. 3. c. 130. to recover the value of premises feloniously destroyed, brought against the hundred by several partners in trade, three of whom being present when the fact was committed, one only gave in his examination upon oath, without stating that to the best of his belief the others had no knowledge of the person who committed the fact: Held that that was not sufficient.

Action

~~DEBT~~ by *Nesham, Robinson, Biss, Beckwith*, and others, being partners in trade, against two of the inhabitants of the hundred or ward of *Easington* in the county of *Durham*, to recover damages which they had sustained by the felonious demolishing of a stable and two staiths of the plaintiffs, by a number of persons riotously assembled together. The first two counts of the declaration were framed upon the 1 G. 1. stat. 2. c. 5. the Riot Act, for an injury to a stable and goods therein; but no question arose on these counts, as it was admitted that the plaintiffs were entitled to a verdict and judgment thereon. The third and the remaining counts of the declaration, were framed upon the 52 G. 3. c. 130. The third count stated that divers persons, to the number of twelve and more, did unlawfully, riotously, and tumultuously assemble together, in disturbance of the public peace, and being so assembled, did unlawfully and with force wholly demolish and pull down "a building of the said plaintiffs, to wit, a staith in the township aforesaid, in the hundred or ward and county aforesaid, of great value, &c.; and which building was, at the time of demolishing and pulling down the same, used and employed by plaintiffs in the carrying on of the trade of plaintiffs as colliers, in contempt, &c. to the damage, &c. and against the form of the statute, &c." The plaintiffs then aver, that one of the plaintiffs, *G. Robinson*, within two days after the damage done to the plaintiffs by such offenders, gave notice of the said offence done
and

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and committed to the said defendants, then and there being inhabitants of the township aforesaid, in which said township the last-mentioned offence and fact were committed, and within four days next after such notice so given as aforesaid, the said *G. Robinson* did give in his examination upon oath before, &c. of and concerning the committing of such offence, and thereupon swore before the said justices, that he the said *G. Robinson* did not know the persons that committed such offence or any of them, according to the form of the statute, &c. whereby an action hath accrued, &c. The fourth count was for the injury of beginning to demolish and pull down the same erection or building; the fifth count, for demolishing and pulling down; and the last count for beginning to demolish and pull down "another building of the plaintiffs, to wit, another staith situate, &c. of great value, &c., in which building, at the time of demolishing and pulling down the same, divers goods of plaintiffs were deposited." Plea, General issue, Not guilty. At the trial before *Bayley J.* at the Summer assizes for *Durham*, a verdict was found for the plaintiffs, subject to the opinion of the Court on the following case:

The plaintiffs, at the time of the injury hereinafter mentioned, were the lessees of a coal-mine or colliery situate in the township of *New Bottle* in the county of *Durham*, and were partners in the working and getting the coals out of the same for sale for their joint benefit. Before the time of the riot hereinafter mentioned the plaintiffs had erected the two buildings called Staiths, mentioned in the last four counts of the declaration, upon certain land included in their lease of the colliery, and situate in the township of *Bishop Wearmouth*, in the

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ward of *Easington*, in the county of *Durham*. The case then proceeded to describe the buildings, and the purposes for which they were used; but this, with reference to the point on which the Court pronounced their judgment, became immaterial.

On the 20th *March*, 1815, the keelmen usually employed upon the river *Wear* collected together in a riotous and tumultuous manner, to the number of two hundred, and forcibly broke into, damaged, and ultimately set fire to the plaintiff's staiths.

The plaintiff *Robinson* was present during a part of the time of the riot, exerting himself to suppress it, but was not present at the commencement or ending of it; having been wounded by some of the rioters, he was obliged to retire. *Biss* and *Beckwith*, two of the other partners, were also there for about half an hour only; they being obliged also to retire, for fear of their lives; *Mr. Biss* being also wounded. On the 22d *March*, notices of the damage were given to the defendants, who are two of the inhabitants of the township where the fact was committed, by the plaintiff *Robinson* for and on behalf of himself and his partners; and on the 25th of *March*, *Robinson*, on behalf of himself and partners, gave in his examination upon oath before two justices of the peace for the said county, inhabiting within the said ward where the offence was committed, in which examination he stated that he did not know the persons who committed the said fact, or any of them. No other of the said plaintiffs delivered in any examination. The action was commenced in due time. It was objected, on the part of the defendants, that it was not sufficient that one only of several joint owners or partners should give in his examination upon oath,

oath, but that all the partners should join in it, or at least as many as appeared to have been present when the offence was committed. The question is, whether the plaintiffs, notwithstanding this objection, are entitled to recover any thing beyond the value of the stable. If the Court shall think that they are so entitled, the verdict is to be entered for the plaintiffs on the four last counts, as well as the two first: but if the Court shall be of opinion that they are not entitled to recover any thing beyond the value of the stable, then the verdict is to be entered for the defendants on the last four counts, and for the plaintiffs on the two first.

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Tindal, for the plaintiffs. Where the defendants shew any reason to suspect fraud, then it may be very fit that all the plaintiffs should be examined upon oath; but in the absence of all fraud, the examination of one of the plaintiffs is sufficient. If it be necessary that every partner should be examined, it would follow that it would be a ground of nonsuit at the trial, if it appeared that one of the partners had at a distance seen part of the riot, although in truth he might be wholly ignorant who the rioters were by whom his property had been actually demolished. The 4th section of this statute is framed upon the 27 *Eliz. c. 13. s. 11.*, restraining the statute of *Winton*. The cases therefore which have been decided on that statute will assist in the construction of this. Thus in the case of *Athcomb v. Hundred of Elthorn Hill* (a), where a servant was robbed in the presence of his master, it was held that the oath of the servant was sufficient to enable him to recover so much

(a) *Carth.* 145.

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of the money as was in his possession at the time of the robbery; and *Holt* C. J. was of opinion that the oath of the servant was sufficient to enable him to gain a verdict, as well for the sum of which he was robbed, as for that which was taken from the master, while in his company. So in the cases of *Jones v. Hundred of Bromley*, and *Bird v. Hundred of Ossultone*, there cited, the oath of the servant alone was held sufficient, without that of the master. So here, the oath of one of the parties whose property has suffered damage, shall be considered sufficient, without requiring the examination of all the partners.

Richardson, contra, was stopped by the Court.

LORD ELLENBOROUGH C. J. Looking at the object of the act of parliament, it is clear that the legislature intended that the hundred should have the knowledge of all the parties claiming the benefit of that act. It may be true, that as far as respects property, the possession of one joint-tenant is the possession of all. But it does not thence follow, that the knowledge of one is the knowledge of all; this act confers a benefit on certain conditions; one of which is, that the party claiming such benefit must make oath, whether he or they have any knowledge of the persons that committed the act. The statute requires that the parties who are claiming that benefit should be themselves immunes from crime, and all free from suspicion, having one only is not sufficient. In this case several of the partners being present when the act was committed, one only makes oath that he had no such knowledge, without even swearing that the other partners, to the best of his be-

lief, had no such knowledge. It is perfectly consistent with this affidavit, that the other partners did in fact know the persons who committed the fact: and they being the persons claiming, ought, by the very terms of the act, to have given in their examination on oath. I think the affidavit defective, first, because the partners present when the act was committed, did not join; and secondly, because it is not made so fully as it might have been, for it does not deny all knowledge of his other partners, to the best of his belief.

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BAYLEY J. I am of the same opinion. By the words of the act "no person or persons shall recover unless he, she, or they give his, her, or *their* examination on oath." The act creates a new remedy (where none existed before); but that remedy is to be obtained only upon certain conditions; the party claiming it is bound to do something in order to obtain the benefit conferred by the act: that is a condition imposed by the legislature. The policy of the act was, that the hundred should obtain, from all persons claiming the benefit, the knowledge of facts, to enable them to prosecute offenders; and for that purpose it compels all persons seeking a remedy, to declare on oath whether they knew the offenders or not. It has been argued, that if the words be construed strictly, absent partners must give in their examination. I am not clear that the act requires that in all cases an affidavit should be made by all; but I have no doubt that all the partners possessing the means of information, should declare upon oath whether they knew the offenders or not; and that if one did claim for the others, he ought, at least, to have negatived their knowledge, to the best of his belief. It

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has been contended, that this is sufficient in the first instance, and that it lies on the defendants to show fraud. But the defendants, in most instances, can have no knowledge, except from persons present when the act was committed; and it is imposed by the legislature as a condition precedent to the right of recovery. The case cited by Mr. *Tindal*, admits of an easy answer; the words of the statute on which that case proceeded are, "that no person shall bring any action except he or they shall, within twenty days before action brought, be examined upon oath, to be taken before a justice of peace of the county where the robbery was committed, whether he or they know the parties that committed the robbery, or any of them, &c." That only makes the oath of the plaintiff necessary; it does not make it necessary to have the additional oath of the persons in company, neither do the words of the act require the oath of the servant.

ABBOTT J. I am of the same opinion. The act says, "that no person shall recover, unless within four days after notice of the offence, he, she, or they shall give in his, her, or their examination on oath before a justice of the peace of the county, liberty, or division where such fact was committed." The words in the statute are, examination upon oath, and not affidavit; the statute points at an inquiry before justices, and not a mere affidavit. In this case there is not any examination, or an affidavit *sufficient* to answer the meaning of the act of parliament. The affidavit is made only by one, who has not said that the others did not concur, or had no knowledge of the offence. Perhaps it may not be necessary, in all cases, that all
should

should be examined, but still I think that the act is not satisfied, unless those who are examined say that the others, who are not, were absent.

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HOLROYD J. I am of the same opinion. Perhaps the examination by such persons as had the care of the property at the time might be sufficient, as the examination of a servant, or that the party acted as agent. The examination is to be, whether he, she, or they had any knowledge of the offence: here there is only the affidavit of one, and not of the other partners. There is not any examination as to the knowledge of the other partners.

Judgment for plaintiffs, on two first counts;
and for defendants on the others.

LORD ELLENBOROUGH. I rather think it would not have been good, if he had not tendered himself and the others for examination. He could not indeed have compelled the justice to take the examination; and perhaps if the justice refused, an affidavit might have been sufficient. But it is unnecessary to pursue this, as the reasons already given are sufficient for the judgment which the Court has pronounced.

GLYNN, Bart. and Others *against* THORPE.

Tuesday,
Nov. 18th.

THE declaration contained two counts by the plaintiff, as indorsee, against the defendant, as acceptor of two bills of exchange: counts for money paid, money

A recognizance is not a record until it is enrolled, and therefore where defendant

pleaded to assumpsit on bills of exchange, &c. that the plaintiff was indebted to him by virtue of a recognizance taken in the Court of Exchequer, which was still in force, as by the said recognizance remaining in the said court before the Barons will appear, without stating that it was enrolled: a replication, that the plaintiff was not so indebted, concluding to the country, was held good, on special demurrer, inasmuch as the plea did not state a debt due by recognizance, which was matter of record.

had

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had and received, and upon an account stated. The defendant pleaded, as to the first and second counts of the declaration, that the drawer did not make the said bills of exchange, in the said first count respectively mentioned, as it was alleged; and secondly, as a further plea to the other counts of the declaration, that the plaintiffs, at the time of the commencement of the suit, were indebted to the defendant upon a certain recognizance, the said plaintiffs having in *Hilary* term, in the 57th of the king, come into the Court of Exchequer, and acknowledged themselves to owe to the defendant the sum of 600*l.*, which they consented should be made of their lands, &c.; and which said recognizance is still in full force, not satisfied; as by the said recognizance, in the said court of our said lord the king, before the said barons of the exchequer, remaining, will fully appear; which sum of money exceeds the damages sustained by the plaintiffs: out of which sum defendant is willing to set off, &c. Replication after joining issue on the first plea, that they are not indebted to the defendant as in that plea alleged, and this they prayed might be inquired of by the country. Demurrer, assigning for cause, that though the plea stated the recognizance, which was matter of record, yet the plaintiffs had not answered the same, but had pleaded that they were not indebted, and that they ought to have pleaded *nul tiel record*, and not *nil debet*; and that the plaintiffs had attempted to try matter of record by a jury, and that they should not have concluded to the country. Joinder.

Comyn

Comyn was called upon by the Court to support the replication; and after stating the question to be, whether a recognizance was necessarily a matter of record, contended, that until enrolment it was no record; and referred to *Bothomley* against Lord *Fairfax* (a), where this very point was discussed, and the Lord Chancellor decided, that before enrolment a recognizance was not to be considered as a record, and that a creditor claiming under such recognizance was only to be considered as a bond creditor.

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Tindal, contra. It appears sufficiently on these pleadings that this recognizance is a record. The plea states that the recognizance was taken in the Court of Exchequer, that it still remains in full force, as by the said recognizance, remaining in the said court, will fully appear. Taking these allegations together, the Court must infer that the recognizance taken in court, now in full force and remaining in court, must be a record. The case of *Bothomley v. Lord Fairfax* only decides, that in questions between creditors of different degree, a recognizance binds only from the time of enrolment.

LORD ELLENBOROUGH C. J. The question in this case is whether a recognizance be necessarily a record: if it be, the replication in concluding to the contrary is bad: if, on the other hand, it be not, and there is not sufficient on the face of this plea to show that the recognizance is a record, the demurrer to the replication cannot be supported, and there must be judgment for

(a) 2 Fern. 750. 1 P. Wms. 334.

the

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the plaintiff. Lord *Coke* (a) says, "a record is a memorial or remembrance in rolls of parchment of the proceedings or acts of a court of justice;" and in the next paragraph, "the rolls being the records or memorials of the judges of the courts of record, import in them such incontrollable credit and verity, as they admit no averment, plea, or proof to the contrary;" and again, "during the term wherein any judicial act is done, the record remaineth in the breast of the judges, and therefore the roll is alterable during that term as the judges shall direct; but when that term is past, then the record is in the roll, and admitteth no alteration, averment or proof to the contrary." According to this authority, a record must be a memorial enrolled. The plea in this case does not state the recognizance to be enrolled, and does not, therefore, shew it to be a record; and that being so, this is a proper mode of replying.

BAYLEY J. It does not necessarily follow, that because the recognizance is in court, that therefore it is of record. The plaintiff, then, was well warranted in his replication.

ABBOTT J. I first thought that the replication should have been nul tiel record; but upon the argument and definition by Lord *Coke*, I am strongly inclined to think that the replication is right. Lord *Coke* lays it down that something must be entered on the roll, and that by such entry, it becomes a record. In deference to that authority, I think that judgment must be for the plaintiff.

(a) 1 Inst. 260. a.

HOLROYD J. Unless a recognizance must of itself be a record, this plea is insufficient. The passage referred to from the first Institute, is an authority, that to constitute a record there must be an enrolment.

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Judgment for plaintiff. (a)

(a) See *Shuttle v. Wood*, 2 Salk. 564.

Dawson v. Goff 1 C. B. Rep. 461.

LEAR against EDMONDS.

Tuesday,
Nov. 18th.

ACTION for use and occupation. Plea, that defendant, for the space of time in the declaration mentioned, used and occupied the premises by virtue of a demise thereof to him made at the yearly rent of 70*l.*, payable quarterly; and thereby, before the commencement of this suit, became indebted to plaintiff in 52*l.* 10*s.* of the rent aforesaid, being the same identical sum of money sought to be recovered by the plaintiff, and that being so indebted, they the plaintiffs, before the commencement of this suit, took and detained, as a distress for the rent so due, goods of the defendant of value sufficient to satisfy the said rent, and the costs of distress. Demurrer, assigning for cause that the plea did not shew that the rent was satisfied by the distress.

Action for use and occupation. Plea, that plaintiff, before action, took and detained, as a distress for the rent, goods of value sufficient to satisfy the same: Held, on special demurrer, that this plea was bad, for not shewing that the rent was satisfied.

*See also Kingham v. the
Lor. Exr. 2 B. & B. 3.*

Laves, in support of the demurrer. Although goods of value sufficient to satisfy the rent be seized under the distress, it does not thence necessarily follow that the rent was satisfied, for the distress may be rescued, or the plaintiff may abandon it. The defendant hath not by his plea shewn that the rent was satisfied: the distress

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tress may or may not operate as satisfaction : whether it did or not, which it is essential the plea should disclose, is left in uncertainty ; and as that fact must be within the defendant's knowledge, the plea is bad. And he referred to *Rastall's Entries* (a), to shew that the usual mode of pleading in such cases, was to state that the rent itself was levied by the distress.

Platt, contra. It is sufficient in the first instance to state that goods of sufficient value were taken under a distress for rent, for it must be inferred that the rent was thence satisfied, the goods being taken for that purpose. It is possible, indeed, that that may not be the case: the plaintiff may however shew that in his replication. In *Robinson v. Cleyton* (b), to scire facias to have execution upon a judgment in a debt, the defendant pleaded that the plaintiff had before taken him in execution upon a ca. sa. ; the plaintiff replied, that though he did take defendant upon the ca. sa., he rescued himself and escaped. Defendant demurred, and the replication was held good. This is an authority, therefore, that the plaintiff might have replied that the rent was not satisfied. A distress, since the statute 2 *W. & M. sess. 1. c. 5. s. 2.*, is become an execution defeazable in five days.

LORD ELLENBOROUGH C. J. The distress may enure as a satisfaction, or may constitute an injury : if the former, then the defendant ought to have pleaded those circumstances which would make it operate as satisfaction ; for it is incomplete as satisfaction, by the mere act of seizure.

(a) P. 175. 2. edit. 1596. (b) *Err. Cor.* 243.

BAYLEY J. The language of the statute of *W. & M.* is, that the person distraining *may* sell the goods, not that he *must* sell; if so, then does he not stand as he did at common law, before the statute; for it is not averred that the goods distrained were sold. It was the duty of the defendant in his plea to set out the whole of his case: the facts were within his knowledge; and they *may* fairly be presumed not to have existed, inasmuch as they are not stated.

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ABBOTT J. It is not even averred that the goods were liable to the distress: but supposing the goods liable, one of three things must have happened; either they *must* have been sold, or they must have been detained until this time, or they must have been relinquished. If the goods have been relinquished at the request of the party, then the distress would not operate as a bar. As to the case cited, that does not apply: there the plea shewed that the debt was satisfied by taking the body in execution under the *ca. sa.*; but the mere detaining of goods is not a satisfaction.

HOLROYD J. concurred.

Judgment for Plaintiff.

HARVEY against JACOB.

Tuesday,
Nov. 18th.

TINDAL, on last *Friday*, had obtained a rule, calling on the plaintiff to shew cause why the plaintiff, or his attorney, should not give security for sentence of transportation, the Court will compel him or his attorney to give security for costs retrospective and prospective.

Where the plaintiff, after issue joined, has been convicted of felony, and received

costs,

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against
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costs, and in the mean time all proceedings be stayed. The affidavit in support of the rule stated, that since issue joined, plaintiff had been tried at the last *Old Bailey* sessions for a felony, for having in his possession forged bank-notes, knowing them to be forged, and was found guilty, and had received sentence of transportation, and was now on board a vessel at *Portsmouth*, preparatory to his transportation. Notice of trial had been given for the second sittings in this term on *Wednesday* last, and application had been made to plaintiffs to give security, which they refused.

Scarlett and *Comyn* now shewed cause, and said this application might have been made at an earlier period to a Judge at chambers, and referred to *Tullock v. Crowley* (a), and an anonymous (b) case in C. B., *T. 49 G. 3.*, to shew that the Court of Common Pleas would not compel security for costs where plaintiff was a prisoner of war in *France*, a bankrupt, or a prisoner in *Newgate*.

Tindal in support of the rule, contra, said, that the application had been made as early as possible. If an *Englishman* leaves the country after issue joined, he must give security for costs: in this case, if there is a verdict for the defendant, it will be impossible for him to obtain his costs, for the property of the plaintiff is forfeited to the Crown, and his person will be out of the reach of the process of the Court. If the attorney has a lien, he may give security; and he cited *Barker v. Hargreave*. (c)

LORD ELLENBOROUGH C. J. If the attorney has sufficient interest in this action to go on with it, he may

(a) 1 Taunt. 18.

(b) 2 Taunt. 61.

(c) 6 T. R. 597.

find the security. If the defendant proceeds without such security, he will be in as bad a situation as if the plaintiff had been an uncertificated bankrupt. It had occurred to me, that as the plaintiff's property will belong to the crown, the crown might have been applied to, but probably such an application would have been fruitless.

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against
JACOB.

BAYLEY J. This application has been made as soon as possible. It is as if in the course of a cause a party becomes insolvent.

Scarlett then suggested that security should be given for prospective costs only, but the Court observed that they were not aware of any instance of costs being apportioned into prospective and retrospective; that assignees of bankrupt in similar cases give security for all costs, and therefore the security in this case must be for all costs.

Rule absolute.

See Ennals v. Brown 4 Bing. N.C. 162

HARRISON against KING.

Tuesday,
Nov. 18th.

THIS was an action commenced in 1809. The declaration contained several counts, two for maliciously charging the plaintiff with the commission of felony, third count for maliciously preferring an indictment for fraud, in obtaining money under false pretences; fourth, for a libel; fifth, sixth, and seventh counts, for verbal slander; the eighth, for a malicious arrest; and the ninth, trover. Plea not guilty, and a

In a case where a general verdict was taken generally for the plaintiff, the Court refused to entertain an application for entering the verdict on particular counts according to the evidence on the Judge's notes, after a lapse of eight

years, and after the judgment had been reversed in error for a defect in one count.

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justifi-

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HARRISON
against
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justification as to the libel. The cause was tried in *December*, 1809, and the plaintiff obtained a verdict for 1500*l.* damages: no evidence was offered in support of the counts for verbal slander, but the verdict was taken generally. Plaintiff obtained final judgment on the 29th *January*, 1810, and on that day was served with an allowance of a writ of error; but the bail in error not being perfected, the plaintiff in *February*, 1810, sued out execution, and on different occasions between that time and *January*, 1811, levied the amount on the defendant's goods. In 1815, the present defendant proceeded with his writ of error, and the plaintiff conceiving the proceedings to be wholly irregular, gave no opposition, and the judgment was reversed in *Easter* term, 1817. (a) One of the counts for slander, without setting out the specific words, merely stated their effect, and was therefore bad; *Cooke* against *Coxe* (b); and it became material for the plaintiff to amend the record, by entering the verdict upon those counts only on which evidence was given at the trial, and the parties applied to Lord *Ellenborough* C. J. before whom the cause was tried, for an order to have the verdict entered so as to correspond with the proof; who desired that the matter might be brought before the Court.

Marryat. This application is made as soon as possible; the reversal of the judgment only took place in *Easter* term last; but supposing it were otherwise, still as there is no limitation to a writ of error, the Court ought not to limit an application of this sort, because then the plaintiff in error, by delaying his

(a) 7 *Taunt.* 431.(b) 3 *M. & S.* 110

writ of error, might prevent this application, and in this case it may be remarked, that the objection upon the writ of error was to a count which has only by a late decision been considered as a bad count.

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LORD ELLENBOROUGH C. J. Although the plaintiff might have been permitted to indulge in sleep for a season, he should have been aroused by the writ of error. The moment the writ of error was brought, it was notice to a man who did not sleep the sleep of death over his rights.

ABBOTT J. (a) If this were to be considered as an application to the Court, I should have no hesitation in saying that the motion could not be entertained. The usual course in cases of this kind is, to apply to the Judge who tried the cause: when that is done it belongs to the authority of the Court to amend the record. As I understand the present application, it is made to the Chief Justice in court, in order that he may have the benefit of our assistance. I have no hesitation in saying, that at this distance of time the prayer of the petition ought not to be granted. Where a declaration consists of many counts, it is the duty of the plaintiff to consider at the trial, upon what counts he will have the verdict entered, and to apply to the Judge at that time, in order that the verdict may be entered on the good counts: but as this must necessarily be attended with great delay at the trial, it has been the habit and practice to do that afterwards, which could not conveniently be done at the trial. But still I think the application should be made recently after the trial, for the Judge

(a) Bayley J. was absent.

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against
KING.

bears then in memory much of what has passed at the time, whereas it is impossible to suppose that at a great distance of time, any human memory can recollect the circumstances. Besides, if by looking at his notes, the Judge should require the assistance of counsel, that assistance may be afforded to him upon a recent application; but if it is to be deferred for a great length of time, the counsel who were employed in the cause may have ceased to fill that character, or if not, still their memory cannot be so distinct as to convey that information to the Judge which they might have done if the application had been recent. The event in this case is rather unfortunate, but the plaintiff has no reason to complain, inasmuch as the bringing of the writ of error might have awakened his suspicions, and he might then have called in the assistance of his counsel, in order to ascertain if there were any exceptionable counts in his declaration.

HOLBOYD J. I am of the same opinion. When the writ of error was brought in 1810, the year after the trial, the attention of the plaintiff ought to have been awakened, and he ought then to have seen whether there was any error on the face of the record, or in what way he would choose to have his judgment entered. In taking the judgment generally he has the benefit of costs on the whole declaration, whereas if he had confined himself to the good counts, he would not have been entitled to his costs for those counts upon which the verdict was entered for the defendant, although he would not have had to pay costs on those counts. For these reasons it seems to me that this is a motion which, if the Court had jurisdiction over it, ought not to be entertained.

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CROOKES and Others *against* FRY and LAVINIA
his Wife.

Thursday,
Nov. 18th.

CASELEE, on a former day, had obtained a rule nisi for the discharge of *Lavinia Fry* out of custody on filing common bail, on the ground of her having been a feme covert at the time of the arrest:

A married woman, arrested on mesne process, is entitled to be discharged out of custody on filing common bail, although her husband had absconded, and the debt had been incurred by her while a feme sole.

Cross now shewed cause on an affidavit, stating that the debt was contracted while she was a feme sole, and that the husband had absconded. In *Roberts v. Mason* (a) the Court of Common Pleas refused to discharge out of custody a feme covert, arrested with her husband for a debt incurred while she was a feme sole; and he referred to the manuscript note of *Gould J.* there cited.

BAYLEY J. Mr. Justice *Gould's* note does not decide this point, that the wife is to be detained in custody; and there are many cases to the contrary. It has been the constant practice in this court, where husband and wife are both arrested on mesne process, that the wife shall be discharged; but the husband cannot be discharged without putting in bail for both.

Rule absolute.

(a) 1 Taunt. 254. See 1 Tidd's Prac. 801. and the cases there cited.

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Tuesday,
Nov. 18th.

WHITE *against* BEAZLEY.

48 A coach and horses, were hired at *Portsea* to take a party to the theatre at *Portsmouth* and to bring back, and a specific sum was charged: Held that this was a letting to hire of horses by the stage, to be used in travelling, and liable to a duty of one-fourth of the amount charged, under 44 G. 3. c. 98. s. 8. So, where a chaise and horses were hired to take a party out to dinner, and to bring back. Mourning coaches hired to take up at a distant place, and to carry thence persons to the place of interment, for which a specific sum is charged, are liable to the same duty; and such coaches are not exempted by reason of carrying a corpse, if living persons go along with it in the carriage.

^{duties}
DEBT for penalties. At the trial before *Graham B.* at the *Lent* assizes, 1816, for the county of *Southampton*, a verdict was found for the plaintiff, subject to the opinion of the Court upon the following case:

The plaintiff was the collector of the duties imposed in respect of horses hired in the county of *Southampton*, by the mile or stage, to be used in travelling, for every mile every such horse was so hired to travel; and also in respect of all horses hired for a less period of time than twenty-eight successive days, for drawing on any public road any coach or other carriage used in travelling post or otherwise; and the defendant was a person duly licensed to let to hire horses for the purposes of travelling post by the mile, or from stage to stage, and also to let to hire for a day, or any less period of time than twenty-eight successive days, horses for drawing any coach or other carriage used in travelling post or otherwise.

1. On the 29th *March*, 1815, *N. Gifford* being desirous of going from *Portsea* to the theatre at *Portsmouth*, hired of the defendant at *Portsea* a coach and pair of horses to take him thence to *Portsmouth* and back, a distance of between one and two miles, upon a public road; he was accordingly taken thence to *Portsmouth*, and after attending the theatre was brought back again on the same day, the horses not waiting for him, but being taken home to the defendant's; and the defendant charged 12s. for the same, and not after the usual or any certain rate per mile. The defendant afterwards, in passing his stamp office

office weekly account with the plaintiff, as the collector, represented this to be a hiring of the horses from *Portsea* to *Portsmouth* and back for two miles, and accounted for and paid to the plaintiff 6*d.*, as the duty in respect thereof.

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against
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2. On the 13th day of *February*, 1815, one *Godenge* having occasion to go out to dinner, hired of defendant at *Portsea* a chaise and pair of horses to take him from *Kingston Crescent* to the dock-yard and back, a distance of two miles, upon a public road: he was accordingly taken from *Kingston Crescent* to the dock-yard, and was brought back on the same day, the chaise not waiting for him but being taken home to defendant's; and the defendant charged a specific sum, namely, 12*s.* for the same, and not after the usual or any certain rate per mile. This was represented by the defendant to be a hiring of the horses from *Kingston Crescent* to the dock-yard and back, (or) four miles, and 1*s.* was paid as the duty.

3. On the 4th of *April*, in the same year, *John Mears*, an undertaker, hired of the defendant a hearse, a mourning coach, and eight horses; four of the horses were so hired to be used to draw the hearse from *Portsea* to *Nurstead*, a distance of seventeen miles, in a public road, there to take up a corpse, and to draw the same thence to *Petersfield*, one mile further on a public road, for interment; the other four of the horses were so hired to be used to go from *Portsea* to *Petersfield*, a distance of eighteen miles, upon a public road, there to take up the undertaker and other persons, and to draw them thence to *Nurstead*, and back again to *Petersfield*, to attend the interment of the corpse. The horses were accordingly used for those purposes on that day. The defendant afterwards charged *Mears* a specific sum,

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namely, 7*l.* 4*s.* for the same, and not after the usual or any certain rate per mile. This was represented to be a hiring of four of the same horses to draw the said coach for two miles, and 1*s.* was paid as the duty.

4. On the 21st *May*, in the same year, *S. Hatch* and *J. Hatch*, undertakers, hired of the defendant at *Portsea* a hearse, two mourning coaches, and six horses; two of the horses were so hired to be used to draw a corpse in the hearse from *Hambrook Row* in *Portsea* to *Portsmouth*, a distance of one mile on a public road, for interment, and the remaining four to draw in the coaches from *Hambrook Row* aforesaid to *Portsmouth*, and back from *Portsmouth* to *Portsea*, on the same road, persons who were to attend the interment of the corpse. The horses were accordingly so used for those purposes on that day. The defendant afterwards charged to and received from the undertakers a specific sum, namely, 1*l.* 7*s.* for the same, and not after the usual or any certain rate per mile. This was represented to be a hiring of four of the same horses for two miles, and 1*s.* was paid as the duty.

5. On the 25th day of *May*, in the same year, the same undertakers hired of defendant, at *Portsea*, one hearse, two mourning coaches, and six horses, to go from *Kingston* to *Portsmouth*, a distance of two miles, upon a public road; two of these horses were so hired to be used to draw a corpse in the said hearse from *Kingston* to *Portsmouth* for interment, and the remaining four to draw in the said coaches from *Kingston* to *Portsmouth*, and from *Portsmouth* back to *Kingston*, on the same road, divers persons who were to attend the interment of the corpse. The same horses were accordingly so used for those purposes on that day. The defendants

defendants afterwards charged to and received from the said *S. Hatch* and *J. Hatch* a specific sum, namely, 1*l.* 16*s.* for the same, and not after the usual or any certain rate per mile. This was represented to be a hiring of four of the same horses for four miles, and 2*s.* was paid as the duty.

6. On the 23d *May*, in the same year, *Stephen Hatch* and *John Hatch*, undertakers, hired of defendant, at *Portsea*, one mourning coach and two horses to go from *Park Lane* in *Portsea* to *Portsmouth* and back, which is a distance of two miles, upon a public road. These horses were so hired to draw in the same coach from *Park Lane* aforesaid to *Portsmouth* the corpse of a child for interment, and divers living persons who were to go with the corpse in the same coach from the former of those places to the latter, and to attend such interment thereof, and to bring back in the same coach the said attendants. The horses were so used for those purposes on that day accordingly. The defendant afterwards charged a specific sum of money, namely, 7*s.* for the same, and not after the usual or any certain rate per mile. This was represented to be a hiring of the same horses for two miles, and 6*d.* was paid as the duty.

The questions for the opinion of the Court were, Whether the defendant was liable to pay to the plaintiff any duties in respect of all or any of the said hirings; and if he was, then, whether he was liable to pay to him in respect of all or any of the said hirings any and what larger sums than he has accounted for and paid as aforesaid. If he was, then the verdict to be entered for the plaintiff for the excess, and for such further sum as upon inspecting the defendant's

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books shall appear to be due; but if he was not, then the verdict to be entered for the defendant.

Bayly, for the plaintiff, contended that the defendant was liable to pay to the plaintiff one-fourth of the amount charged, and he said there were two principal questions applicable to all the six hirings; first, whether they were lettings to hire by the stage; and secondly, whether the horses were used in travelling; and he contended in the affirmative of both these questions. And on the first point, he cited *R. v. Swift*. (a) He admitted that in the third, fourth, and fifth cases, there might be a distinction in favour of the defendant, as to the horses employed in drawing the hearses, those not being liable to any duty, but the defendant would still be liable to pay the duty of one-fourth on the amount of that proportion of the sum charged, which was applicable to the horses drawing the mourning coaches.

Gaslee, contra, contended that in the first and second cases, the horses were not let to hire for the purposes of travelling; that it was nothing more than a going from one house to another, and that cases of this description were not within the contemplation of the legislature. That in the third case, supposing mourning coaches to be liable to any duty, still it did not appear that any person went in the coach from *Portsea* to *Petersfield*, a distance of ~~seventeen~~ miles, and therefore for that space at least there was no traveller; and he referred to *Smith v. Moss*. (b)

(a) 8 *East*, 584. n.(b) 3 *M. & S.* 15.

under the
48 Geo. III c. 98
s. 8

In that case, he said, *Dampier J.* seems to have considered mourning coaches as excepted; but he admitted that the exception as to mourning coaches was to be found only in the sixth section of the 48 G. 3. c. 98., and that exception applies to a different subject. In the sixth case, he observed that the mourning coach was used as an hearse, and therefore was exempt upon the authority of *Smith v. Moss*.

LORD ELLENBOROUGH C. J. If upon the letting to hire, there be a terminus a quo and a terminus ad quem specified, it is a hiring for that space; and a hiring by the stage is an hiring for a given space. Then as to the second point, travelling in a larger sense means a going from one place to another. The Court only decided in *Smith v. Moss*, that where there was no living person in the conveyance, there was not any traveller, and on that ground hearses were considered as excepted. In all other cases where there is a living person to be conveyed, there is a travelling. The exception in the sixth section shews that mourning coaches were a class of conveyances within the contemplation of the legislature. I think therefore the payment of the duties ought to have been made according to the directions of the eighth section in all the cases.

BAYLEY J. I am of the same opinion. As to the case of the coach carrying the corpse of the child, I do not consider that as excepted; hearses are only excepted, because there is no traveller; but here there were living persons in the coach with the corpse.

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ABBOTT J. The exception in the sixth section shews that the legislature considered mourning coaches as conveyances used for travelling. As to the third case, it is true that the party was actually carried only two miles; but I take it, that when the charge is by the mile, if a carriage goes two or more miles to take up, the duty is payable on those miles.

HOLROYD J. concurred.

Judgment for the plaintiff.

Friday,
Nov. 21st.

ATTWOOD *against* DAVIS.

Proceedings by bill, concluding with a prayer of judgment of the writ, and declaration founded thereon; Held bad upon special demurrer.

PROCEEDINGS by bill, and declaration in assumpsit against the defendant upon bills of exchange, money counts, &c. Plea, the defendant comes, &c. and prays judgment of the said writ, and of the said declaration thereon founded, because the promises and undertakings were made jointly with one *Abraham Walker*; wherefore, &c. he the said *Nathan Davis* prays judgment of the said writ and declaration, and that the same may be quashed, &c. Special demurrer, assigning for cause, that the proceedings were commenced by bill; whereas the defendant had pleaded as if the proceedings had been commenced by writ, and that the plea could not be taken to be a plea to the said bill, and the declaration thereon founded, and that the defendant had prayed judgment of the writ and declaration, when he ought to have prayed judgment of the bill and declaration.

Reader

Reader was called on by the Court to support the plea. He admitted that it was inartificially drawn, but said, that although the prayer of judgment was imperfect, yet the Court would *ex officio* give a right judgment.

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LORD ELLENBOROUGH C. J. There must be judgment for the plaintiff of *respondeas ouster*, unless bill and writ be the same thing.

BAYLEY J. There is a distinction between a plea in bar, and a plea in abatement; in the former, the party may have a right judgment upon a wrong prayer, but not in the latter.

Barneswall was to have argued in support of the demurrer.

Per Curiam, Judgment quod respondeat ouster. (a)

(a) See *Hixon v. Binns*, 3 T. R. 185. and 2 Saund. 209. n.

The KING *against* The Inhabitants of the Parish of STOKES GOLDING, in the County of LEICESTER.

Saturday,
Nov. 22d.

UPON appeal, the quarter sessions for the county of Leicester quashed an order of justices for the removal of *Joseph Underwood*, *Sarah* his wife, and their

An indenture of apprenticeship, made 1797, having been signed only by one overseer of

the appellant-parish, the respondent-parish, to shew that only one had been appointed in that year, called upon the appellants to produce the original appointment, (having given them notice to produce all books and writings relating thereto,) one book only was produced, and that was not for the year 1797: Held that the respondents, not having taken any means to procure the testimony of the overseer himself, (who must be presumed to have the custody of the original appointment,) were not entitled to give secondary evidence of its contents.

two

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two children, from *Stoke Golding* to *Oddestone*, subject to the opinion of this Court on the following case: .

Joseph Underwood, his wife, and two children, were removed from *Stoke Golding* in the county of *Leicester*, to *Oddestone* in the same county. On appeal against the orders, the birth of the pauper at *Oddestone* was proved. The appellants then put in an indenture of apprenticeship, by which the pauper was bound by the parish of *Oddestone*, in 1797, to *Francis Chamberlain* of *Stoke-Golding*, and under which he served six years and a half. To this indenture the respondents objected, that it was signed by one churchwarden and one overseer only: and to shew that only one overseer had been appointed for the year in which the indenture was executed, they called for the appointments of overseers, having before given the appellants notice to produce all vestry books and writings in their custody or power touching the appointments of overseers of the poor for the parish of *Oddestone*, and particularly the appointments of the overseers for the years 1796, 1797, and 1798. One parish book was produced; it did not apply to the year 1797. That was the only book in existence. The parish officer who produced it swore that no appointments were kept. The respondents then called a witness who had lived in *Oddestone* seventeen years, including the year 1797, and had served the office of overseer five or six times. He said, there was only one overseer in those years, and never was more than one overseer. To this it was objected, that the appointments being in writing, parol evidence could not be admitted. The Court were of this opinion.

Gurney,

Gurney, Philipps, and Dwarris, in support of the order of sessions, contended that the sessions were right in rejecting the parol evidence. The appointment of the overseer was in writing, and that ought to be produced if in existence. Notice was indeed given to the parish officers of *Oddestone* to produce it: but in the ordinary course of things the original instrument could not be in their possession, but in the possession of the overseer who derived his authority under it; and for the justification of whose acts it would be necessary: that person is not subpœna'd. The original instrument (for any thing that appeared) may therefore be in existence, and then ought to have been produced, and the secondary evidence is not admissible.

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Nolan, Beauclerk, and Marriott, contrà, contended that they had done all that was necessary to entitle them to give the secondary evidence; that the parish having so great an interest in these appointments, ought to have had the custody of them: they had notice to produce them, and it was proved that they had none such in their possession. The written appointment must therefore be taken not to be in existence, and the sessions in that case ought to have received the parol evidence.

Lord ELLENBOROUGH C. J. The question is, whether the justices below have done wrong in rejecting the parol evidence. This is clear, that the parol evidence could not be admitted until the case was ripe for the admission of secondary evidence; now it could not be considered as ripe for that purpose, until the parish of *Stoke Golding* had exhausted all the proper means of pro-

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procuring the primary evidence. Have they done this? First, as to the appointment itself, they gave a notice to the parish, and supposing the parish had the actual custody, that notice would have been sufficient; but that does not appear. Have they then the legal custody? certainly not, for the legal custody is in the officer who is the person most interested in the instrument, and who requires its production as a sanction for those acts which he may be called upon to do under its authority. Now here there has not been any notice to the overseer himself. They were certain of him, and through him they might have made their way to procuring all the others, if more than one had been appointed. I think, therefore, that as in this case there has been an omission of the means of exhausting the primary evidence, recourse could not be had to that of a secondary nature, and therefore, I cannot feel, or satisfy myself, that the sessions have not done right in rejecting it.

BAYLEY J. The party here had not entitled themselves to go into the secondary evidence. This is a removal from *Stoke-Golding* to *Oddestone*; *Stoke-Golding* relies on a birth settlement, in answer to which the other party set up a service under an indenture in *Stoke-Golding*: that indenture purports to be signed by one overseer only; that will do, unless it appear that more than one was appointed. One overseer is named, he is not called, how is the Court to know, whether more than one has been appointed? For that purpose, they must look at the appointment itself; that ought to be in the possession of the party to whom it was given, for whom, and whose acts, it was to be a justification; they ought to have

have applied to him ; if he had been called, or if they had been entitled to give his conduct in evidence, that might have done ; it would not have been necessary to have called in aid the statute 54 G. 3. c. 170. because non constat that the overseer of the year 1797, was overseer then, and one of the parties to the appeal. If the appointment had been produced, and on the face of that, it had appeared that only one overseer had been appointed, that might have thrown the proof on the other side. In the absence of any proof of this kind, it seems to me, that the secondary evidence was not admissible.

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ABBOTT J. I am of the same opinion. The material question at the hearing of this appeal, was, whether in the year 1797, one person had been appointed overseer, or more than one ; it was for the interest of *Stoke Golding* to contend that only one had been appointed. As the act requires more than one, the Court must presume that the act has been complied with. The sessions, therefore, were justified in presuming that there were more than one, unless *Stoke Golding* shewed that only one had been appointed. The ordinary proof of this is the appointment itself ; that is not produced, and the question is, whether *Stoke Golding* have done enough to dispense with its production ; the step they took was to give notice to the parish officers to produce it. Now the appointment is not kept in the parish-chest ; the fact, as it appears, is, that it is never kept there. I think, therefore, that the notice was not sufficient ; they might have applied to the one overseer ; but they did not take any step to that effect : whether he was living or dead, or where he was residing, if living, does not appear. It

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seems to me, therefore, that the parish of *Stoke Golding* have not taken such measures as were necessary in order to let in the secondary evidence.

HOLROYD J. The law presumes the appointment to be in the custody of some of the overseers, who are responsible for all the acts done under it; notice therefore should have been given to the party in whose custody the law places the appointment; that has not been done: the decision of the sessions therefore was right.

Order of Sessions confirmed.

Saturday,
Nov. 22d.

The KING against The Inhabitants of Sow.

Where a female natural child was hired for a year by the wife of its reputed father, and continued doing the household work for three years, but after the first year no wages were paid, nor was there any new contract of hiring; Held that the sessions were warranted in finding that after that time she did not continue on the terms of the original hiring.

UPON an appeal, the sessions confirmed an order of two justices, for the removal of *Elizabeth Darby*, from the hamlet of *Coundon* to the parish of *Sow* in the county of *Warwick*, subject to the opinion of the Court on the following case:

The pauper being settled at *Kearsley*, was hired in *November*, 1812, by the wife of Mr. *Deeming* of *Sow*, for a year, at 50s. wages, and what clothes Mrs. *Deeming* pleased. Previously to this hiring, the pauper, who is a natural daughter of Mr. *Deeming*, lived with her mother at *Kearsley*, and the hiring was for the purpose of gaining a settlement in *Sow*. As soon as she was hired, she went into the service of Mr. *Deeming*, served him for a year, and continued to live with him until the month of *July*, 1816, when she went away; during the whole of which time she did the household work, as she did during the first year, but

no

no conversation took place between the parties about hiring after she was so hired as aforesaid in *November*, 1812, and there was no second hiring, unless from continuance in the service of *Mr. Deeming*, a hiring ought to be implied, which in the opinion of the sessions under the circumstances stated, it ought not. Some months after the expiration of the first twelve-months, *Mr. Deeming* gave the pauper 5*l.*, fifty shillings thereof for the first year's wages, and desired her to keep the remaining fifty shillings, and say nothing about it. The pauper never afterwards received any sum on account of wages, but received at different times clothes and pocket money. *Mr. Deeming*, at *Lady-day*, 1816, removed with his family to the hamlet of *Coundon*: the pauper removed with them, and continued to live with them there till the month of *July*. The court of quarter sessions further find, that there was no fraud in this case.

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Holbeck and *Finch*, in support of the order of sessions, contended, that although the continuance of the service in ordinary cases was evidence of a continuance upon the terms of the original hiring, yet it was not conclusive; and in this case, the relation of father and child subsisting, and the non-payment of wages after the first year, afforded abundant evidence, that the pauper was no longer a hired servant; but remained with *Mr. Deeming* on the footing of a child with its parent. This was at all events a question of fact for the sessions to decide upon, and they have so determined it; and unless that decision be contrary to all the evidence, the Court will not interfere.

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Reader and Adams, contra. The pauper continued to live with her reputed father, and do the household work after the first year, as she did during the first, for which there was a distinct contract, and it must thence be inferred, that she continued on the terms of the original hiring. There is nothing stated in this case, to shew that she lived on different terms after the first year, and might she not upon these facts, have maintained an action for her wages at the end of the second year? In this case too, there is not only evidence of the service continuing during the second year, but of its being upon the same terms; for the pauper at the end of the first year received two years' wages, which must be considered as a payment by anticipation of the second year's wages. [*Bayley J.* It is perfectly clear, that the sum of fifty shillings was a gift, for she is desired to say nothing about it.]

Lord ELLENBOROUGH C. J. I cannot set the sessions more right than they have set themselves. They have drawn the right conclusion from the facts before them; the pauper was hired for a year, and fifty shillings were paid to her; that was paid with another sum, and there is no question that the one sum was paid as wages and the other as bounty; it is true that the service continued the same, but there was not any hiring for the second or any subsequent year. Not being able to find fault with the inference which the sessions have drawn, I think there is no ground to disturb the order. Suppose an action had been brought by this servant for wages due to her for her service during the second year, and the jury had done what the sessions have done here; the Court upon motion would not, under the

the circumstances of this case, have granted a new trial. Although the service continued the same, there was not a hiring for the second year, as there was for the first.

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BAYLEY J. I think the sessions have done perfectly right; where the parties are not related, it may fairly be presumed from a continuance in the service, that the terms on which they continue are the same as during the preceding year. But where the relation of father and child subsist, the ground for that presumption fails, and here there are a variety of circumstances to shew that there was not any new hiring. The parties were living during the second year upon different terms from what they lived during the first.

ABBOTT J. I think the sessions were perfectly justified in deciding this case as they have done, inasmuch as after the first year, the pauper was living as a child with her parent, and not as a servant with her master.

HOLROYD J. It was the province of the sessions to draw their own conclusion, and I think they have drawn it rightly.

Order of Sessions confirmed.

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Tuesday,
Nov. 25th.

HENNELL *against* **CHARLES LYON**, Administrator, with the Will annexed, of **MARY LYON**, deceased.

Upon a plea of plene administravit, plaintiff, in order to shew assets, gave in evidence a copy of a bill, and answer, purporting to be an answer by a person of the same name, and sustaining the same character as the defendant: Held that the copy was admissible, and that on the face of it there was presumptive evidence of identity; the defendant not having shewn any circumstances to rebut the presumption.

ASSUMPSIT for goods sold by plaintiff to intestate.

Plea, 1. Non assumpsit. 2. Plene administravit. At the trial before *Abbott J.* at the *London* sittings, plaintiff having proved the goods sold, in order to shew assets in hand of the defendant as administrator, produced an examined copy of a bill, and an answer, purporting to be an answer by *Charles Lyon* to a bill filed in Chancery against him in his character of administrator of *Mary Lyon*. The bill was filed by Messrs. *Maltby* and Co. as well on their own behalf as on that of all other creditors, praying an account. The plaintiff in this action was not a party to that suit. It was objected, that that was insufficient evidence, for it was res inter alios acta: that the plaintiff should have produced the original answer, and verified the hand-writing, or he should have shewn that this defendant was the defendant in that suit: that in the absence of such evidence there was no proof of identity. The learned Judge, however, received the evidence, and the jury found a verdict for the plaintiff. *Walton* having obtained a rule nisi for setting aside that verdict, and entering a nonsuit,

Marryat and *Platt* shewed cause. To prove matter of record or documents of a public nature, it is not necessary to have the original record or document, or, where it is signed, to verify the hand-writing. In the
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case of a parish register, as of a marriage, it is not necessary to produce the original, although the parties sign it; and the same rule holds as to the journals of the House of Commons, and transfers of stock. If it were necessary to prove the hand-writing of the defendant in this case, it would be equally so in the case of a sheriff's return to a writ; yet that may be proved by a copy, and such copy is constantly received without verification of the hand-writing. In *Salter v. Turner* (a), Sir A. McDonald C. B. admitted an office copy of an answer to an information filed in Chancery by the Attorney-General, without proof of the hand-writing of the defendant. So in *Lady Dartmouth v. Roberts* (b), examined copies of a bill in the Exchequer, and an answer put in, not by the defendant on the record, but by a former occupier of the land which the defendant then held, were received in evidence at the trial before Thomson B., and this Court was of opinion that they were properly received. In debt upon a recognizance of bail, or upon a plea of judgment recovered, the mere production of the record, or of an examined copy, is sufficient without proof of identity; it lies on the other side to shew he is not the same person. The present case is still stronger in favour of the evidence; for here the answer purports to be by *Charles Lyon*, administrator of *Mary Lyon*; so that he sustains the same character in that suit as he does in the present action.

Walton, contra. The bill offered in evidence purported to be filed by a stranger to the present record; the proceedings therefore at law and in equity were not

(a) 2 Campb. 87.

(b) 16 East, 334.

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between the same parties. The answer in such case could only be received as an admission, in the same manner as letters are; the original, therefore, ought to have been produced, and the hand-writing verified. In *Chambers v. Robinson (a)*, which was an action for a malicious prosecution, the plaintiff, to increase the damages, offered the office copy of an affidavit made by the defendant in Chancery of his being worth a large sum of money: Lord *Raymond* refused to let it be read, and the plaintiff was obliged to send for the original, which was filed in Chancery. Supposing the modern practice of receiving copies of public documents without further proof to be well founded, there is no reason why such copies should not be evidence in all cases; yet it is quite clear that they are not receivable in criminal proceedings: as upon an indictment for perjury, in an answer to a bill filed in Chancery, the original must be produced, and positive proof made by a witness acquainted with the defendant, that it was sworn by him. In the case of old documents where the parties are all dead, it is impossible to prove identity; but it is not so in modern cases, where every person concerned is capable of giving the evidence required. It is not sufficient to say, that the description of the defendant in the answer tallies with that of the defendant on this record; for until the identity is proved, the Court cannot look into the answer.

Lord ELLENBOROUGH C. J. The admission of copies in evidence is founded upon a principle of public convenience, in order that documents of great moment

(a) *Bull. N. P.* 239.

should

should not be ambulatory, and subject to the loss that would be incurred if they were removable. The same has been laid down in respect of proceedings in courts, not of record, copies whereof are admitted, though not strictly of a public nature. In all these cases it may be laid down as a general principle, that copies should be received. In this case, the answer being a proceeding in a court of justice, must have been received there in the usual course, and verified by the person putting it in, as the answer of the person sustaining the character which it imports him to bear; and there is no question here, as to that answer having been put in by a person bearing that name and character. But it is said, that the evidence wants a further link to connect it with the defendant, and that it ought to be shewn that the *Charles Lyon* in the answer is the present litigant. I do not know any way by which that circumstance can be supplied, but by the description in the answer itself, which tallies in almost every particular. Still, however, it may be shewn that he is not the same person. The question then is, whether public convenience requires that the proof should be given by the plaintiff or the defendant; and I rather think that public convenience is in favour of the admissibility of this proof, giving the other party an opportunity of shewing that he was not the individual named in the answer. It should be taken as proof that he is the person named in the answer, until the contrary be shewn. I do not say that it is conclusive, but that it is *prima facie* evidence. I confess, however, that this case forms a sort of anomaly; but expediency requires that the evidence should be admitted: and such appears to have been the general practice, except in criminal cases. Wishing that the

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rules laid down in the administration of justice should accord with public convenience, I do not feel inclined to disturb the practice, although I do not see clearly the reason upon which the distinction between civil and criminal proceedings, as to the admissibility of this evidence, has obtained.

BAYLEY J. The bill and answer being proceedings in a court of justice, it is of the utmost importance, that the originals should be preserved; and great inconvenience would result if they were moved about from place to place; and indeed they might be wanted in more than one place at the same time. On this ground, therefore, such proceedings are provable by examined copies. Then the question is, whether the copy of the answer in this case was sufficient, or whether the identity should not also have been proved; but I think that it did afford *primâ facie* evidence, to shew that the defendant was the same person. The suit at law is against *Charles Lyon* as the administrator of *Mary Lyon*, and the bill in equity is against *Charles Lyon* as the administrator of *Mary Lyon*. I take it for granted, the bill would describe him by his place and addition; that would also be another circumstance to shew identity. Now it would be impertinent for any other person but *Charles Lyon* to put in an answer to such a bill. We may therefore fairly presume, that the answer was put in by *Charles Lyon*, and we may fairly conclude that it was the same *Charles Lyon*, for it was open to the defendant, to have shewn that there was another *Charles Lyon*. But in the absence of any such rebutting proof, the evidence given was *primâ facie* evidence of identity, and if that is once established, there is an end of the case.

ABBOTT J. I entertained some doubts at the trial, as to the admissibility of this evidence; but I thought it better to receive it, and upon the discussion and the authority of *Lady Dartmouth v. Roberts*, I think the evidence was properly received. It is a general principle, that copies are receivable in such cases without the originals, from the great inconvenience which would result, if the documents were taken to different places. There would have been a danger of loss from such a practice, and besides, the documents might be wanted at different places at the same time. The objection is, that the answer ought not to have been received, because it was not shewn that the defendant putting in the answer was the identical defendant on this record; but in order to ascertain that, let us look at the pleadings in *this* and *that* suit. In this, he is sued as the administrator of *Mary Lyon*, and he does not plead that he is not the administrator; he therefore admits that to be the character which he sustains. Then we find upon the proceedings in Chancery, a bill filed against *Charles Lyon*, administrator of *Mary Lyon*, and an answer put in by *C. Lyon*, in that character: now if the party to the suit in Chancery is not the defendant, then there are two persons, each of whom is administrator of a *Mary Lyon*. There is nothing to shew two administrations, and it is rather extraordinary to suppose that two persons of the same name should sustain the same character. It is not to be presumed that there are two persons, but the identity is rather to be presumed, unless the plaintiff could have shewn the contrary. In this case, however, there was no evidence given on the part of the defendant,

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to rebut the presumption of identity; and therefore I think it was sufficiently established.

HOLROYD J. I am of the same opinion, that the copy of the bill and answer was properly received. It has been holden from the time of *Holt C. J.*, that where the original itself is evidence, the immediate copy of the original is also evidence. In *Hoe v. Nathorp* (a), this principle is laid down; and it is there stated, that the copy of a church register and the copy of a probate of a will, concerning the personalty, is good evidence; but that the copy of a probate of a will, as to the realty, is not evidence, because the probate itself is not evidence in such a case. That being so, if the original bill and answer would be evidence, a copy would equally be evidence, without the original bill and answer, so far as the original bill and answer would be evidence, without further proof; here I think the original answer would have been evidence; the Court having jurisdiction, it must be taken as the answer of the person against whom the bill was filed; if received in that court as the answer of the person who was the defendant there, then it may be read here, in order to see whether it applies to the present case. If then the original would have been evidence, an examined copy stands in the same situation, according to the authority in *Lord Raymond*. Then how does the question stand? The person sued here is *Charles Lyon*, sued as administrator of *Mary Lyon*, and the copy of the answer shews that the bill was filed against *Charles Lyon*, as administrator of *Mary Lyon*. There is therefore *prima facie* evidence

(a) 1 *Ld. Raym.* 154.

that the *Charles Lyon* in that court and in this, are the same person, which is the only identity wanted. In *Cameron v. Lightfoot (a)*, in order to prove some of the facts, an affidavit made by the defendant was given in evidence, without proof of his hand-writing or that he was sworn thereto. That, indeed, was an affidavit filed in the very court in which the action was tried; but there is no difference between that case and the present, when you get the length of establishing that the original answer put in in another court, is to be received here as the answer of the person whose answer it purports to be. I think, therefore, that this evidence was properly received.

Rule discharged.

(a) 2 *Blac. Rep.* 1190.

Ex parte DENT.

W. E. TAUNTON moved that a person resident in the country, practising as an attorney, should be re-admitted an attorney without giving a term's notice; and he grounded his application on the fact of the applicant having instructed his agent in town to take out his certificate, which the latter, through inadvertence, omitted to do, of which the applicant not being aware, had continued to practise.

The Court granted the application, observing, that there was not any rule of Court requiring the notice; but it was a term usually annexed to applications of this sort; it seemed, however, reasonable to dispense with it here,

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A person who has continued to practise as a solicitor after his certificate has expired, may, under circumstances, be re-admitted without giving a term's notice.

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here, the party having continued to practise unconsciously. (a)

(a) Ex parte WINTER.

(a) *Barnwall*, on a subsequent day in this term, made a similar application, in a case where a solicitor had given directions to his clerk to take out his certificate, and furnished him with money for that purpose: the latter had applied the money to his own use; and the applicant, unconscious that his certificate had not been taken out, continued to practise after his former certificate had expired; and upon the authority of the preceding case, the Court granted the application.

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Nov. 25th.

The KING *against* The Sheriff of MIDDLESEX,
in a Cause of WILLIAMS *against* PENNELL. (b)

Seemle, that a return by the sheriff to a bill of *Middlesex*, stating that he took and detained the defendant until he rescued himself, is sufficient, without naming the rescuers, or stating them to be people of the county.

But the return not stating the arrest to have taken place in the county was held to be bad.

E. LAWES shewed cause against a rule which had been obtained by *Holt*, for setting aside an attachment against the sheriff for not bringing in the body, with costs for irregularity; on an affidavit stating that the sheriff, having been ruled to return the bill of *Middlesex*, had returned "that he did on the 18th day of *October*, 1816, arrest and take the body of the defendant, and detain him, until afterwards he rescued himself out of the sheriff's custody; and that afterwards, and before the return of the precept, he was not found in the said sheriff's bailiwick." He contended, that it was not sufficient to return, that the party rescued himself, unless it was said to be by people of the county, as in *Waldo v. Lambert* (a); but that the

(b) We were favoured with this report by the gentlemen who argued the case.

(c) *Cro. Eliz.* 868.

return

return ought regularly to name the rescuers, as in *May v. Proby* (a), so that the plaintiff might have his remedy against the rescuers; although he admitted that the sheriff was not bound to take the posse comitatus with him to execute mesne process. *Crompton v. Ward*. (b) He admitted also that it might be sufficient if it was shewn by the return how, and with what force the defendant rescued himself, as by presenting a pistol at the sheriff's officer, or by being more than his equal in bodily strength, or the like; but contended that where nothing of that sort was stated, the sheriff was liable to an attachment, for which he cited the case in *W. Jon.* 201. where the sheriff returned that two women rescued the defendant in his way to prison, after being arrested on a latitat, and the Court ordered that an attachment should go against the bailiff, to examine if the escape was by fraud or not.

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Holt, who supported the rule, said, that *Gibbs C. J.* had held, in a case of *Fermor v. Philipps, Easter, 57 G. 3. C. P.*, that although it was not enough for the sheriff to say that he rescued himself, yet it might be so, if stated to be with force and arms.

The Court seemed inclined to hold, that the return in this respect was sufficient, according to *Com. Dig. tit. Rescous. D. 4.* They intimated that an indictment would be good, stating that the defendant rescued himself with force and arms. And Lord *Ellenborough C. J.* said, that the ground of the decision in

(a) *Cro. Jac.* 419. 1 *Roll. Rep.* 289. 440. 3 *Bull.* 199.

(b) 1 *Str.* 429.

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W. Jon. 201. was that the names of the women who made the rescue were not mentioned in the return.

E. Lawes then took another objection to the return, that it did not state that the defendant was arrested in the county, but only that he rescued himself there; and if the arrest was out of the county, a subsequent rescue was lawful, and therefore no excuse to the sheriff. *Off. Breu.* 203, 204. 217. 226.

BAYLEY J. referred to *Yelv.* 51. *Mo.* 422. *pl.* 585. *Com. Dig. tit. Rescous.* D. 5., and

The Court held this exception good; and therefore discharged the rule, with costs.

The Court will set aside an attachment against the sheriff for not bringing in the body, with costs, upon an affidavit that the plaintiff purposely prevented the defendant's being retaken after a rescue, and that the application was by the sheriff himself, without negating the fact of his having an indemnity.

After the above rule had been discharged, *Holt*, the same day, obtained another rule in the same cause, for setting aside the attachment generally, with costs, on an affidavit, stating that the plaintiff had purposely kept the defendant out of the way to prevent his being retaken by the sheriff's officer, and that the defendant was rendered by his bail, and that the application was made on the part of the sheriff, and not in collusion with the defendant.

E. Lawes opposed this rule, first, on the ground that all the facts in the present affidavit existed at the time of the former rule, and therefore the judgment pronounced upon that rule was conclusive between the parties, for which he cited Lord *Kenyon's* opinion in *Greathead v. Bromley*, 7 *T. R.* 456. He also contended on the authority of *Rex v. Sheriff of Middlesex*, 3 *M. & S.* 299. that the affidavit

davit was insufficient for making the rule absolute, even on payment of costs, as it did not negative there having been an indemnity to the sheriff from the defendant in the cause.

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But *The Court* held the affidavit in the present case equivalent and sufficient, and therefore made the rule absolute on payment of costs.

The KING *against* WOOLER.

Thursday,
Nov. 26th.

THE defendant on a former day in this term obtained a rule to shew cause " why the list of persons named by his majesty's coroner to form the jury on the trial of the information (filed against him by the Attorney-General for a libel) should not be cancelled, on the ground of such persons having been improperly, illegally, and partially selected by the coroner; and why the sheriffs of *London* should not again attend the coroner with the books or lists of persons qualified to serve on juries, for the purpose of forty-eight persons being named, out of whom a jury might be formed for the trial of the issue joined upon the information. The defendant and his solicitor, *Charles Pearson*, in their affidavits in support of the rule, stated that they attended the nomination of the forty-eight persons at the Crown Office, where the clerk of the secondary of *London* having produced several books, lists, and papers purporting to be the lists of persons qualified to serve on juries within the city of *London*, the coroner began to select names from the books, against which selection the defendant protested, as illegal; upon which the coroner

In striking a special jury, the coroner is not bound to take the jurors as they occur upon the sheriff's books, but is to make a selection; and where he had made such selection impartially, the Court refused to cancel the list of persons so selected.

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then turning his eyes from the books, inserted a pen into one of them, and professed to take indifferently the names against which the pen alighted in the list: that his pen however alighting upon the name of *R. Taplin*, a rag-merchant, he at first announced him as one of the jurors, but upon reflection rejected him, and substituted the name of another person described in the books as a wine-merchant, who continued upon the list of the forty-eight: that the coroner also rejected a *Mr. William Gillman*, a respectable banker in the city of *London*, and substituted in his place *Thomas Fellows*, who was stated to be a broker, extensively employed by government in the sale of old stores: that the defendant in both instances protested against such rejection and substitution, but in vain: that the whole of the forty-eight had not been impartially and indifferently chosen, but partially and arbitrarily culled and selected in a manner likely to prejudice the defendant materially at his trial. It was further stated, that the books or lists produced out of which the forty-eight names were taken, were not such as the law required: that by an act of common council the lists of persons qualified to serve on juries in the city of *London* were required to be returned from each ward annually and signed by the *alderman*; that of those lists some were dated as far back as 1812; one only had been signed by the *alderman*, others by the deputies, others by the ward clerk, and that some of them were not even signed at all.

In answer to this application, the coroner in his affidavit stated, that at the nomination of the jury, mentioned in the defendant's affidavits, a person from the secondary's office attended, and brought with him a book containing the names of persons in the different wards

wards of *London* qualified to serve on juries; that either being the book, or similar to the one from which the special juries had for many years past been selected: that he also brought with him lists contained in separate books, purporting to be from different wards, and containing a general statement of persons qualified to serve on juries: that he the coroner then proceeded to select a jury from the separate lists, and not from the book formerly used for that purpose, and to the use of which the defendant objected: that having been appointed to this office in *July*, 1813, he was informed that the usual mode of nominating special juries in *London*, was by the nomination of forty-eight persons designated as merchants, in the book returned by the secondaries, and that the usual mode of nominating special juries in counties, was by the nomination of forty-eight persons designated as esquires, or other persons of higher degree, in the freeholder's book returned by the sheriff: that he had uniformly adhered to this practice of nominating in counties at large, persons designated as esquires, or persons of higher degree, and in the city of *London*, persons designated as merchants generally, or as of some particular description of merchants which appeared to him of a respectable class; and that soon after his appointment, he adopted the following as the best mode of nominating the juries, *i. e.* he put his pen between the leaves of the book produced to him for that purpose, before he looked into it, and then, upon opening it, fixed upon the name of the person so designated as merchant or esquire, or other person of higher degree, which was nearest to his pen, and nominated such person accordingly: that he began to nominate the jury in this cause as in all others, by in-

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serting his pen between the leaves of the several books or lists, and nominating the person (designated as a merchant) nearest to whose name his pen did fall: and that having nominated one person from one book or list, he then took the next, and so in succession, endeavouring to select a person designated as a merchant, from each of the books or lists: that he frequently had occasion to look through many pages, without meeting with any person designated as a merchant, and that in one book, he did not even find any person so designated: that then finding the difficulty of fixing upon proper names in the manner already stated, he did after some time, open the leaves of the books or lists indiscriminately, and casting his eye rapidly over them, fixed on the names of such persons as he casually and accidentally saw described as merchants, and that he did not approve of, reject, or substitute the name of any person, from any motive of partiality, favour, or affection, or from any view whatever, but that of nominating those who came within the description of persons from whom special juries had been usually nominated: that five months having elapsed since the striking of this jury, he did not recollect the fact of announcing the name of Mr. *Taplin*, who is a rag-merchant, and substituting a wine-merchant in his place; but that he would not on any occasion, have nominated a person designated as a rag-merchant, because such designation would not, according to his judgment, bring the person so described, within the class of persons from whom special juries have been usually selected: that according to his judgment, a wine-merchant was of that class of persons fit to be returned upon special juries, and for that

that reason only he nominated *J. Mears*, of whom he knew nothing except from the books or lists produced to him: that he did not recollect having announced the name of *Gillman*, and afterwards substituting that of *Fellows*, but that he could have no other motive for not nominating *Gillman*, but that of his being a banker, and therefore in his judgment, not coming within the description of a merchant: that his only motive for nominating *Mr. Fellows* was, that he accidentally fixed upon his name in the manner before stated, and that he was described in the book as a merchant: that he did not, at the time of the nomination, nor does he now, know any thing respecting *Taplin*, *Gillman*, *Mears*, or *Fellows*, their character, connections, opinions, principles, situation, or employment; and that he never received any communication, directly or indirectly, from any person of and concerning any of them; and that to the best of his knowledge, at the time of the nomination of the jury, he did not know any one of the individuals composing the same; and that he had not received any suggestion or communication whatever from any person concerning them, or any of them; and that no motive of partiality induced him to fix upon them in preference to other persons contained in the books or lists; and that he nominated them impartially, and from his accidentally having fixed upon them in the manner before described, and from believing them to be of that class of persons from whom special jurors had been usually nominated." The practice of selecting in counties esquires, or persons of higher degree, and in London and other cities merchants, was fully confirmed by Master *Le Blanc*, and Mr. *Barlow*, the secondary of

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the Crown Office. *Mr. Collingridge*, the secondary of *London*, in his affidavit stated, that he had been in the secondary's office twenty-two years, and during all that time in the constant habit of making returns of grand and petit jurors: that he never had any such lists as were mentioned in the defendant's affidavits; and that until lately he had never heard of the acts of common council there referred to: that the practice usually adopted was, to apply to the deputies of the wards to send the return of all the inhabitants fit to serve on juries within their respective wards, (it coming to each ward to serve on juries about once in three years,) and from the books so returned to make returns of the grand and petit jury: and that at the time appointed for the nomination of this jury, he sent the books returned by the deputies of each ward respectively, together with a book which had before been generally used in nominating special juries.

The Attorney-General now shewed cause; and after stating that the affidavits which had just been read contained so full and so distinct a disavowal of every improper motive in the officer of the Court, that the charge of partiality must be considered as completely answered; he proceeded to argue, that this mode of striking the jury was not illegal; whether the books were irregularly made up or not is immaterial upon this motion, the ground of which is, that the jurors have been illegally selected by the coroner: he was bound, however, to take the names from the lists presented by the sheriff; if those lists be improperly made out, the latter alone is responsible for his neglect. But the material question intended to be discussed upon this motion is, whether

whether the coroner was justified in making a selection, or whether he was not bound to take the names in the order in which they occurred upon the books of the sheriff. In ordinary cases the sheriff, out of the lists returned to him by the several constables and tithing-men, containing the names of persons qualified to serve on juries, selects the panel out of which the petit jury is formed; and it might as well be said, that in that case the sheriff should take the names as they occur upon those lists, as that the officer of the Court should take them in the order they occur upon the lists returned by the sheriff. Special juries were first introduced upon trials at bar, and in causes of great consequence; but it being doubted in other cases whether this could be done without consent, the statute of the 3d G. 2. c. 25. s. 15. enacted, that the Court might, on motion, order a jury to be struck before the proper officer of the Court for the trial of any issue in such a manner as special juries had been usually struck upon trials at bar; and by 17th section, the sheriff is directed to bring the lists of persons qualified to serve on juries, and the jurors are to be taken out of such lists. The Court therefore by this statute was empowered to order the jury to be struck, as had been usual upon trials at bar. Then what had been that practice before the statute? For whatever that was, was to be the rule followed by the Court in ordering, and the officer in striking, a special jury. In *Lilly's Prac. Reg.* 155. a. 23 Car. 2. B. R., it is stated that upon motion and affidavit that the cause to be tried at the bar is of very great consequence, the Court will, if they see cause, make a rule for the secondary to name forty-eight freeholders. And by a rule of Trinity term, 8 W. 3., it

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was ordered, that upon every reference by the Court to the secondary to return any jury, or to *name* forty-eight sufficient persons to try any issue at bar, if the attorney on one side shall make default to attend at the time appointed for the *naming* of the jurors, &c., in such case the secondary shall *name* the jury aforesaid, and shall strike out twelve on behalf of each party, and the rest shall be returned to try the issue. This is abundant authority that the practice then was for the officer to *name* the jury: he is in fact in this very case, as in all others, directed to name the jury, and if the fault be any where, it is in the Court who made, and not in the officer who executed the order. But the order itself is perfectly legal; and if he is therefore to name, he must exercise a judgment on the subject. He is not to take indiscriminately the names as they occur on the books. Such a practice would defeat the very object of the rule; *i. e.* the obtaining such individuals as from their education and intelligence were calculated to decide properly on questions of difficulty. The lists furnished by the sheriff contain the names of persons of various ranks and degrees of education qualified to serve on juries; and if they were to be taken indiscriminately, it might happen that the most ignorant and incompetent might be chosen to try a most momentous and difficult issue. It follows, therefore, from the terms of the act of parliament, the uniform practice of the Court, and the nature and object of the rule itself, that the bounden duty of the master is to name and appoint such persons as from their condition are in his judgment most fit to discharge the duties of a jurymen in causes of moment and difficulty. He has executed his duty in this instance by rejecting a rag-merchant, whom, from his description,

tion, (judging from general character) he deemed not to be a person likely to possess the degree of knowledge requisite for a special jurymen. Adopting the invariable practice, he has also rejected a banker, as not coming within the description of a merchant: he has fairly and honestly exercised his judgment in these instances, as he had a right to do; and this rule must therefore be discharged.

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The Defendant in person contended, that the coroner had no right to select the jury, but was bound at all events to take fairly as they occurred, the names of all such as usually served on special juries; that he had no right therefore to reject *R. Taplin*, who was a merchant, and substitute another. And assuming that commercial knowledge is a requisite qualification for a special jurymen in *London*, a banker from the nature and the extent of his dealings, is as fully qualified in that respect as any merchant, to decide upon questions of difficulty: the term merchant in its larger sense, comprehends every species of person engaged in trade. As to the charge of partiality, the facts were before the Court, and they were to decide whether that was made out or not. It was of the utmost importance, that the administration of justice should be free from every ground of suspicion. In questions between individuals, the mode (as practised) of striking special juries, is of little consequence, but where the crown and a subject are the litigant parties, it is of the utmost moment that the jury should not be arbitrarily selected by a public officer deriving his appointment indirectly from the crown.

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Lord ELLENBOROUGH C. J. I entirely agree with what has fallen from the defendant, that the administration of justice ought not only to be pure, but unsuspected; and if, after the most attentive consideration of every syllable of the affidavits, it had been made appear that in any one respect blame could be imputed to the officer of the Court, I should readily have enforced any application for his punishment, or for vacating any acts done by him in the corrupt exercise of his functions. The rule is directed against the mode of proceeding, and the conduct of the officer. As to the mode, it is said the juries are improperly and illegally struck; and as to the officer, he is charged with partiality. Can any man, who has heard the detail of the affidavits, say that there is a colour for any part of the application? As to the mode, is it a mode that has obtained to-day for the first time? on the contrary, has it not obtained from all times to which the practice of the Court can be traced? The rule itself is not modern, nor has its form been varied: it requires "that the sheriff shall attend the coroner with the books or lists of persons qualified to serve on juries, and that he shall name thereout forty-eight good and sufficient men, of whom twelve shall be struck out on each side, and the remaining twenty-four returned to try the issue." Has the sheriff then attended with the books or lists? he has; and the secondary, who has been acquainted with the practice for upwards of twenty years, states, that he presented to the coroner, besides the book which, during that time, had been constantly used, separate lists returned from the several wards: the officer is bound by the very terms of the statute 3 G. 2. c. 25. s. 17.

to take the jurors out of such lists. There is nothing, therefore, to impeach the mode as far as the source from which the officer drew his information is concerned: it is the source pointed out by the act of parliament; and if the books or lists have been made up with any vice; if they are not conformable to the habit and practice that have prevailed, the parties framing them are liable to be called into court, and have the matter imputed to them as an offence; but the officer has proceeded on the books exhibited to him; he could not alter them if required, and they are the usual (and as far as he knows) the legal sources, from which special juries are to be drawn. Then as to the juries being struck illegally; is there any illegality in the officer rejecting some and substituting others? that will depend upon the fifteenth section of the statute 3 G. 2. c. 25. which enacts, "That the Court may, on motion, appoint a jury to be struck for the trial of any issues in such manner as special juries had been usually struck in trials at bar." The question then is, In what manner, before the passing of this statute, special juries were struck upon trials at bar? Now it appears from *Lilly's Practical Register*, and from the Rule of Court 8 W. 3. that it was the practice of the Court upon trials at bar to make a rule for the secondary to *name* the forty-eight: that was the form of the rule before the statute; it is authorized by the statute, and has continued to be the uniform practice of the Court to the present day: and the rule in this very instance, as in all others, directed the master to name the forty-eight. The officer, therefore, is to nominate,
not

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not to copy, nor to take the names in sequence as they stand upon the page; that would not accomplish the design of the legislature and the Court; that would not secure a *special* jury. The situations, habits, and education of men vary: he is to nominate; and the very word implies that he is to exercise a judgment upon the subject: the mode in which the coroner proceeded, was by putting his pen into the book, and taking the name nearest his pen, of the person coming within the description of a merchant: the law does not absolutely require that the jurors shall be merchants, but the practice certainly has been within the city of *London* to take such only as came within that description, and in counties, those who come within the description of esquires or persons of higher degree: that has been the mode in which the officers have at all times exercised their judgment as to the class from which special jurors are to be selected; and the conduct of the officer would have been liable to exception, if he had departed from that practice in this instance; but it is said, that he has rejected a rag-merchant, and substituted in his place a wine-merchant. I am of opinion, that if he did this in the honest exercise of his judgment with a view of obtaining competent special jurors, he did only what was his duty: if he were even mistaken in this instance, he is not to blame, if this rag-merchant were of all men the most enlightened, and the best informed, and the master had taken another in his place less competent, it was an error in judgment, but no crime: I, however, think that the officer, in rejecting the rag-merchant, exercised a sound discretion; for though the individual might possibly be a person of the best education and greatest intelligence, yet his description does not certainly denote

denote that class of persons, where those qualities are generally found; the description of a wine-merchant, generally marks a person of a higher rank in society. Upon the question therefore of legality, I am of opinion, that the coroner had a right to select fairly and honestly with a view to attain the object of the rule, persons who in his judgment, were, from their better education and superior intelligence, calculated to decide upon questions of difficulty. It remains only to be considered, whether he acted partially: if he had selected any person from personal preference or any undue motive, it would be a corrupt exercise of his functions; he appears however to have been guided by the most correct and sacred sense of duty: in his affidavit he disavows all motives of corruption, and all knowledge that could possibly influence a corrupt man, or enable him to serve the purposes of corruption; he has most completely and absolutely exculpated himself, not only from the fact of corruption, but from every imputation that ingenuity could suggest against his integrity; and every person giving the least attention to the affidavits must feel convinced that he has not only acted in the incorrupt and most impartial discharge of his duty, but that he has most studiously proceeded so as to avoid imputation of any sort: he certainly is much indebted to the defendant for making this application, and thus affording him the opportunity of full exculpation. I cannot conclude without saying, that it is most gratifying to the Court, and most important to the public, to know that the duties of officers connected with the administration of justice, are discharged with so much integrity and such laborious industry.

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BAYLEY J. I am of the same opinion. Three objections have been made by the defendant. First, that the master has no right to nominate: secondly, that the books from which the names were taken, were improperly made out; and, thirdly, that the officer partially and corruptly discharged his functions. With respect to common juries, the power of selecting the panel belongs to the sheriff; and before the statute of 3 G. 2. c. 25. it had been usual in cases of great consequence to have the jury named by the master from the lists returned by the sheriff. The object of the Court was, to have the assistance of persons of superior capacity and knowledge in the decision of difficult matters of fact; and the officer of the court, with a view to attain that object, must have selected the names of persons from those stations and ranks in society where such qualities are usually found. If the officer were bound to take the first forty-eight names that occurred on the opening of the book, would the object of the Court be attained? It clearly would not; and unless, therefore, there were some mode of distinguishing by the description annexed to the persons returned in the sheriff's books, those persons likely to possess the qualities required in a special jurymen, that purpose could not be answered. The distinction very properly fixed upon, is that of esquire in counties, and of merchant in cities: it has been from the earliest time acted upon, as to the class of persons from whom the selection is to be made. The statute 3 G. 2. c. 25. directs special juries to be struck, as the practice, before the statute had prevailed, with respect to trials at bar. That clearly was for the officer to name the jury; and if he had named or selected the whole forty-eight fairly and honestly, solely with a

view

view of selecting persons, in his judgment, fit for the discharge of the duties required, I think he was fully authorized so to do. Then as to the charge of partiality, that is most completely and satisfactorily answered: to avoid any imputation of that sort, the officer adopts the mode stated in the affidavit. These lists contain the names of all persons entitled to serve upon any juries; and of course many not fit to serve on *special* juries, where superior capacity and knowledge is required; the officer therefore prescribed to himself a rule of selection, (which he was not bound to do) that he might be considered to act with the utmost impartiality: he rejects *Taplin*, because, from his description, he did not conceive him likely to possess the intelligence required in a special jurymen; and another as not coming within that description, from which special jurymen in *London* had always been taken, and he substitutes others, in his judgment, more likely to possess the qualities required in that character; and this is done without any improper motive on his part, and without any knowledge of the circumstances of the persons rejected or substituted. I am therefore of opinion, that the officer of the court has not acted illegally, corruptly, or partially, and that this rule ought to be discharged.

ABBOTT J. I am also of opinion that this rule ought to be discharged. The question is one of great importance to the public, as it relates to the trial by jury, which has ever been justly considered one of the most inestimable privileges of a *British* subject. The rule was granted, on the ground of its being imputed to the officer, that he had acted improperly, illegally,

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illegally, and partially. On consideration of the affidavits on both sides, I am of opinion, that the officer has acted properly, legally, and impartially. By the rule of the Court itself, the officer is required to name the forty-eight; in ordinary cases, the sheriff nominates the panel, and the jurors composing the same, are persons selected by the sheriff. By this statute, that power of nomination which belonged to the sheriff in common cases, is vested in the officer of the Court; and these officers before and since the statute, have been in the constant habit of selecting for special juries, persons coming within the description of esquires or merchants; and if this had been a question now agitated for the first time, I do not know that any better mode of discrimination could be pointed out. It is said, however, that the master has departed from this mode, and from an undue preference, has selected some and substituted others: that he was influenced by any improper motive, he has most distinctly and unequivocally denied: it is true, that he rejected a person described as a rag-merchant, as not coming within that class of persons whom he thought likely to afford the degree of knowledge and intelligence requisite to enable a man to discharge the duties of a special jurymen. And although an individual of that class may possess those qualities in an eminent degree, yet the officer of the Court, judging only from his general experience, may fairly have drawn a conclusion, that superior knowledge was not generally to be found in that description of persons, and he then had a right to exercise his judgment accordingly; so he rejected another person who was described as a banker, he not coming within the description of merchants from which
class

class it has been usual to select special juries in *London*. It was objected, that he substituted a person who was employed by government in the sale of stores; but he swears most positively, that he knew nothing of the circumstances of that person, and that he selected him as being the next person against whom his pen fell in the book. On the whole, I think that the conduct of the coroner has been legal and most impartial, and that this rule should be discharged.

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HOLROYD J. After what has already fallen from the Court, I shall content myself with saying, that the charge of impropriety, illegality, and partiality, is completely answered; and that the result of the affidavits is, that this conduct of the coroner has been most proper, legal, and free from all partiality whatever.

Rule discharged.

The KING *against* JONAS JONES.

Thursday,
Nov. 27th.

CAMPBELL, on a former day, moved that the prisoner, who had been committed by the coroner of *Monmouthshire*, to the county gaol, on a charge of manslaughter, might be bailed by a magistrate of that county. He produced affidavits, shewing that the deceased had been killed by falling in a fight which he himself had provoked; and that the prisoner, from poverty, was unable to defray the expence of being brought to *Westminster* to be bailed by the Court. For the form of the application, he cited a precedent in the 10th of G. 3., to be found in the Crown-office, in which this mode of proceeding had been adopted.

Where the Court think that a prisoner ought to be bailed for felony, if he be unable to defray the expence of being brought to *Westminster* for that purpose, they will grant a rule to shew cause why he should not be bailed by a magistrate in the country, with a certiorari to return the depositions before them.

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The Court said, that without an affidavit of the poverty of the prisoner, they would not dispense with his being personally brought before them; but under the circumstances of the case, they granted a rule to shew cause, (to be served upon the next of kin of the deceased, and the coroner,) why he should not be admitted to bail by a magistrate of the county of *Monmouth*, with a certiorari to the coroner to return the depositions.

And now, upon an affidavit of service, and the depositions being returned and read in Court,

The rule was made absolute.

Thursday,
Nov. 27th.

The KING against The Justices of ESSEX.

Where an order of removal was served on the appellant-parish on *Saturday*, and the sessions were holden on the following *Tuesday*, and the appellant-parish was thirty-seven miles from the place where the sessions were holden, but there was no appeal to those sessions, and the justices refused to receive the appeal at the next sessions, the Court granted a mandamus.

A RULE had been obtained on a former day, calling upon the defendants to shew cause why a mandamus should not issue, commanding them to receive and hear an appeal against an order of removal, by which a pauper was removed from the parish of *Tolleshunt Knights*, in the county of *Essex*, to the parish of *Washbrook*, in the county of *Suffolk*. Upon shewing cause against the above rule, the following facts appeared upon the affidavits.

The order was made on *Tuesday* the 8th *July*, 1817, and was served about twelve o'clock on the following *Saturday*. The distance between the respondent and appellant parishes was twenty-four miles, and the appellant parish was thirty-seven miles distant from *Chelmsford*, where the sessions were held on the *Tuesday* following, and lasted four days; and by the practice of that sessions, a motion to enter and respite the appeal might have been made at any time during the sessions.

The

The parish not having appealed at the *July* sessions, the justices refused to receive the appeal at the *Michaelmas* sessions, on the ground that that was not the next quarter sessions within the meaning of the statute 13 & 14 *Car. 2. c. 12. s. 2.*

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Jessopp and Kelly now shewed cause against the rule, and argued that the *July* sessions were the next sessions at which the appeal ought to have been entered. The order of removal was served on the *Saturday*, so that the appellants had more than two days before the commencement of the sessions to enter their appeal. They cited *Rex v. The Justices of Herefordshire (a)*, in which the order of removal was made on the *Friday*, the pauper actually removed on the *Saturday*, and the sessions holden on the *Tuesday* following. The Court there held, that a parish twenty miles distant were bound to appeal to those sessions, and could not be heard at the following sessions. That case is directly in point. *Sunday* was one of the intervening days in that case, as well as this; and it is worthy of observation, that the 43d *Eliz. c. 2. s. 2.* expressly directs the overseers to meet upon a *Sunday* upon the subject of the poor. But at all events the appellant ought to have entered and respited the appeal.

LORD ELLENBOROUGH C. J. The stat. 13 & 14 *Car. 2.* certainly directs the appeal to be at the *next* quarter sessions, but that must mean the next practicable sessions. The parish officers must have a reasonable time allowed them to make the necessary inquiries, that they may judge of the propriety of appealing or not. The notice here is served on the *Saturday*. I am of

(a) 3 T. R. 504.

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opinion that they are not bound to devote *Sunday* to such a purpose. They have then only one entire day, *i. e.* the *Monday*, to get the necessary information, and to consider whether they will appeal or not, and that in my judgment is not sufficient. It has been said, that although the appeal could not have been heard at those sessions, still that it ought to have been entered and respited: but that would only be incurring a useless expence, without conferring any benefit on either party, and was therefore quite unnecessary.

Rule absolute. (a)

Nolan, Knas, and Walford, were to have argued in support of the rule.

(a) See *R. v. Justices of Southampton*, B. R. Trin. 57 G. 3.

Friday,
Nov. 28th.

THACKRAY against HARRIS.

The defendant having put in and perfected bail, a ca. sa. was lodged and returned non est inventus, and proceedings being had against the bail, they rendered the principal in time: the defendant was then bailed again and discharged: Held that proceedings could not be had against the last bail without taking out a fresh ca. sa.

THE defendant had been arrested on a special capias, and had put in and perfected bail. In *Easter* term 1817, a ca. sa. was lodged, and returned non est inventus, in order to fix the bail, against whom proceedings were commenced by scire facias in *Trinity* term; but before the quarto die post of the second sci. fa. the bail rendered the principal. In *Trinity* vacation the defendant applied to be bailed, on the ground that as he had not been charged in execution he was still in custody on meane process; and having put in fresh bail, he was discharged out of custody. In the present *Michaelmas* term proceedings were commenced by sci. fa. against the fresh bail, without taking out and lodging a new ca. sa.; and on this ground *F. Pollock* moved to set aside the proceedings against the bail for irregularity.

Littledale

Littledale shewed cause, and contended that as the defendant was in custody, the second set of bail must be presumed to know of all the previous proceedings that had taken place against him, and that a ca. sa. had issued; that they could not contend that every thing ought to be done over again, which was requisite as against the first set of bail, because in that case they might as well say that a fresh judgment ought to be obtained. But the second set of bail having become so at a period of the cause when it was impossible that the terms of the usual recognizance, which requires judgment to be obtained, could be complied with, the bail must take the defendant as they found him, *i. e.* with both a judgment obtained and a ca. sa. lodged against him, and that they could not require any further proceedings to be taken as far as related to the defendant, and that it was sufficient if the usual scire facias issued against themselves; and that therefore the proceedings were regular. But

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The Court, although doubting whether the defendant was entitled to be bailed after a ca. sa. had issued, thought that, as it did not appear that the Judge, when he admitted the defendant to bail, or that the bail themselves, knew that a ca. sa. had issued, the defendant, when bailed, was liberated on the usual terms to the bail after judgment, which were, that a ca. sa., as well as scire facias, should issue, and that the bail were entitled to notice by means of a fresh ca. sa.; and therefore made the rule absolute, but without costs, as the point was quite new.

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*Keff. v. W. J. H. & C. B. 60*Friday,
Nov. 28th.VAN SANDAU *against* —, one, &c.

Bond conditioned for the payment of a principal sum in the year 1820, with interest in the mean time half-yearly: an action having been brought for the penalty upon a breach of the condition in non-payment of half a year's interest on the 29th *Sept.* 1817, the Court refused to stay the proceedings before judgment on payment of the interest due and costs; although the non-payment of the interest was owing to a slip.

THIS was an action brought on a bond in the penal sum of ten thousand pounds, conditioned for the payment of five thousand two hundred and fifty pounds, on the 29th of *September*, 1820, with interest in the mean time payable half-yearly. The breach was the non-payment of half a year's interest which became due on the 29th of *September*, 1817. It appeared that the plaintiff's attorneys, on the 1st and 3d of *October*, had written to the defendant for the payment of this interest, but not having received any answer, they had filed the present bill against the defendant early in this term. The defendant took out a summons before *Bayley J.* to stay proceedings on payment of the interest due and costs. On the case coming on to be heard before the learned Judge, it appeared that the defendant had quitted *London* on the 27th of *September*, having left with an agent two bills of exchange, with directions to get them discounted, and to apply a part of the produce to the discharge of this interest in question: that the defendant did not return to *London* until the end of the month of *October*, when he found that his agent had failed to get the bills discounted, and had not paid the interest: that the defendant, on the 5th of *November*, tendered to the plaintiff's attorneys a check on the bank of *England*, in whose hands he then had more than sufficient to answer the same, but they refused to accept the same, saying, that the plaintiff meant to proceed to judgment. The learned Judge was of opinion, that from the facts it was evident that the forfeiture of the bond was a mere slip,

and although in law the bond was forfeited, yet that the plaintiff should not be allowed to go on and obtain his judgment, the effect of which would be to make a new agreement between the parties; as it might compel an immediate payment of the money, which the parties had agreed should not be paid until the year 1820, and thereupon he ordered that upon payment of the interest due on the bond in question in this cause, with costs to be taxed, all proceedings should be stayed.

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 against

Topping, on a former day in this term, obtained a rule nisi for the discharge of this order, and he referred to the statute of 8 & 9 W. 3. c. 11. sect. 8., by which it is enacted, "that upon paying into court the amount of the damages, the execution may be stayed, but the judgment is to stand as a security;" and he said that in *Darby v. Wilkins* (a), where a bond conditioned to pay by instalments was put in suit, the first payment not being made, the court refused to stay the proceedings before judgment, upon payment of that instalment with costs; and in *Massen v. Touchet* (b), the Court of Common Pleas, in a similar case, refused to stay the proceedings, but directed judgment to be entered for the penalty, with a stay of execution; and he cited *Tye v. Carter* (c) as a modern authority to the same effect.

Bolland now shewed cause, and said, that there had been contrary decisions upon this subject. In *Lucas v. London, Mic. 11 G. 2. (d)*, payment of all the past instalments with interest and costs was held sufficient, and the money not yet due was ordered out of

(a) 2 *Stra.* 957.(b) 2 *Bl. Rep.* 706.(c) 2 *Taunt.* 387.(d) 2 *Stra.* 957. notes.

court

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court to the party who brought it in; and in *Moss v. Hardy (a)*, *Trin.* 28 G. 2., the Court of Common Pleas stayed proceedings, upon payment of the only instalment then due, with costs.

Lord ELLENBOROUGH C. J. The defendant in this case has been guilty of a slip which amounts to a breach of the condition of the bond; he has thereby given to the plaintiff the advantage of obtaining a judgment for the whole penalty. To what extent the Court may feel disposed to relieve the defendant against the consequences of such a judgment, is another question: but we are of opinion, at present, that the plaintiff is entitled to proceed in this action, and that the judgment must stand as a security.

Rule absolute.

(a) *Barnes*, 288.

END OF MICHAELMAS TERM.

C A S E S

ARGUED AND DETERMINED

1818.

IN THE

Court of KING's BENCH,

IN

Hilary Term,

In the Fifty-eighth Year of the Reign of GEORGE III.

MEMORANDA.

IN the last vacation Sir *William Grant*, Knt. resigned the office of Master of the Rolls, which he had held since 1801. And

Sir *Thomas Plumer*, Knt. Vice-Chancellor of *England*, was appointed Master of the Rolls.

Sir *John Leach*, Knt. Chancellor to His Royal Highness the Prince of *Wales*, Chief Justice of *Chester*, and one of His Majesty's Counsel learned in the Law, was appointed Vice-Chancellor of *England*. And

In the course of this term *William Draper Best*, Esq. one of His Majesty's learned Serjeants, on resigning the office of Attorney-General to His Royal Highness the Prince of *Wales*, was appointed Chief Justice of *Chester*.

1818.

*And. . . Stephens. b. 213. 24th. 1817*Friday,
Jan. 23d.ARCHIBALD M'NEILAGE *against* JOHN PETER
HOLLOWAY. (a)

Where a bill of exchange was payable to a feme sole, who intermarried before the same was due, it was holden that the husband might sue in his own name, without joining the wife, although the latter had not indorsed the bill.

DECLARATION stated, that *S. Branscomb*, before the intermarriage of plaintiff with one *Anne Innes*, according to the usage and custom of merchants, duly made her certain bill of exchange, and directed the same to defendant, by which the said *Sarah* requested defendant to pay, three months after the date thereof, to *Anne Innes* or her order, 187*l.* 10*s.*, for value received, and delivered the bill to said *Anne*, which bill defendant accepted, &c.; and plaintiff avers, that after making the bill, and before same became payable according to the tenor and effect thereof, &c. at, &c. he intermarried with the said *Anne Innes*, by means whereof defendant, after the intermarriage of plaintiff with said *Anne*, &c. became liable to pay to plaintiff the money in the bill specified, according to the tenor and effect of the bill and of his acceptance; and being so liable, defendant, in consideration thereof, after the intermarriage of plaintiff with said *Anne*, &c. promised plaintiff to pay him the money in the bill specified according to the tenor and effect of the bill, and of his acceptance thereof.

Plea non assumpsit.

(a) The Judges of this Court sat at *Serjeants' Inn* on *Monday* the 19th *January*, and on the succeeding days, until the term, and heard this and several of the following cases argued by counsel, and delivered their opinions, as upon former occasions, (*see ante*, p. 1.) and the Court afterwards gave judgment on the day on which the cases are now reported.

Scarlett,

Scarlett, in the last term, had obtained a rule, calling on plaintiff, who had, upon this declaration, obtained a verdict, to shew cause why the judgment should not be arrested, on the ground that the wife ought to have been joined in the action: against which rule cause was now shewn by

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Marryat and Deacon. In this case the husband might well sue alone. It is very true that in many cases it has been decided that the wife must be joined with the husband, as in all actions for debts due to her dum sola, *Fenner v. Plaskett* (a), 1 *Roll. Abr.* (b), *Garforth v. Bradley* (c), *Bull. N. P.* (d), *Milner v. Milnes.* (e) But where the right of action is inchoate before the marriage, and consummate after, there he may either sue alone or join the wife in the action. As in trover, where the trover is before, and the conversion after the marriage, *Powes & Ux. v. Marshall* (f), *Blackborne & Ux. v. Greaves.* (g) In those cases the only doubt was whether the husband could join the wife. So, where the wife's land is granted before the marriage on lease; there the husband must join the wife in an action for rent accruing before the coverture; but for rent subsequently accruing he may either join her or sue alone. There the lease, which is the foundation of the debt, is granted before the marriage, and rent accrues after. So here the acceptance, which is the foundation, is before the coverture, and the bill becomes due after. It follows, therefore, that here he

(a) *Moor* 422.

(b) P. 347. R. pl. 3.

(c) 2 *Ves.* 676, 7.

(d) P. 179.

(e) 3 *T. R.* 627.(f) 1 *Sid.* 172.(g) 2 *Lev.* 107.

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may either join the wife or sue alone. In *Sir John Brett v. Cumberland* (a), the Court held that in covenant against lessee for years for not repairing during coverture, where the reversion was granted to husband and wife, he may either sue alone or join his wife; and in the report of that case in *Bulstrode* (b), it is laid down by *Doddridge J.*, to which *Coke C. J.* assents, that the husband may well have an action in his own name, without his wife, for the recovery of that which he may discharge alone, and of which he may make disposition to his own use. But, secondly, This bill of exchange is to be considered rather as a chattel personal than a chose in action. It is in its nature assignable, transferable by indorsement, and capable of being appropriated, as it has been in fact, by the husband. The act of marriage operates as a transfer of it to him in law, and is a virtual indorsement. The wife could not, after the marriage, have indorsed it; *Barlow v. Bishop* (c); and the husband might have done so.

Scarlett, contra. The principle which governs the question, whether the husband shall sue alone or join his wife, is that of survivorship. If the debt will survive to the wife, supposing the husband not to have reduced it into possession in his lifetime, then he must join her in an action for it; otherwise not. The rule is very clearly laid down by Lord *Kenyon* in *Milner and Others v. Milnes* (d), that all personal chattels of the wife are given by the marriage to the husband, and for the recovery of them he may bring an action alone;

(a) *Cra. Jac.* 399.(b) 3 *Bulst.* 164.(c) 1 *East*, 432.(d) 3 *T. R.* 631.

but

but that in order to reduce a chose in action into possession he must join the wife. Then here a bill of exchange is a chose in action. But it is contended that it is a chose in action of a peculiar nature. It is transferable undoubtedly; but that is by custom of merchants alone. And the custom of merchants provides that it shall be transferred only in one way, viz. by indorsement. But except in this particular it remains like any other chose in action. There is no indorsement here. But it is contended that the marriage operates as a transfer. It may operate as a transfer; but it cannot be a transfer according to the custom of merchants; and if not, then the bill of exchange remains as any other chose in action; which, if the husband wishes to reduce into possession, he must do so by joining the wife in the suit. Unless, therefore, he does so, or passes it away by indorsement, it would, after his death, survive to the wife.

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Lord ELLENBOROUGH C. J. It is laid down in *Coke* upon *Littleton* (a), and *Comyn's Dig.* (b), that all chattels personal which the wife has in possession in her own right, are vested in the husband by marriage, although he do not survive her. This is a rule of law universally recognized. The words chattels personal, are sufficiently large to cover a negotiable instrument of this sort: it is payable to her order; and if the relation of husband and wife had not subsisted, a formal indorsement to transfer the property in the instrument would have been necessary: then the question is, whether the marriage having vested the right in the

(a) 351. b.

(b) *Baron and Feme*, E. 3.

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husband, it be necessary to go through the form of an indorsement. The law does not require superfluous acts: is it then necessary that that should appear on the face of the bill? It can only be necessary as evidence of an election on his part, to take to the property in his marital right; but that is unequivocally shewn, by bringing the action in his own name. No case having been cited to shew that a formal indorsement is necessary, I think that by the act of marriage itself, he is virtually an indorsee: if he had appeared as such on the face of the bill, there could be no doubt of his right to maintain this action; but the marriage has in fact given him all the rights of an indorsee, and it therefore seems to me to be unnecessary for us to go through the formal derivation of title by indorsement.

BAYLEY J. I am of the same opinion. This being a negotiable security, the right of action shifts with the possession. Chattels personal vest absolutely in the husband by marriage. Choses in action do not; for in order to reduce them into possession it is necessary to join the wife. The case of a negotiable security, is a middle case; whoever has the instrument in his possession, and the legal right to it, may sue upon it in his own name. It differs in this respect from a bond and other securities not negotiable. By assigning a bond, a right of suing only in the name of the obligee is conferred. The bill is payable to the wife, and the effect of the marriage is not to destroy the negotiability of the instrument; in whom then will the power of indorsing vest? certainly not in the wife, for her power to do so is superseded by the marriage:
then

then it must be in the husband. It may be said that he could not indorse to himself; perhaps not; because in that case there would be no transfer; but that must be on the ground of his having the entire interest in the bill without indorsement. We break in upon no principle therefore by saying that this is a species of property in the possession of the wife at the time of the marriage, which by the act of marriage itself vested in the husband.

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ABBOTT J. I entertained some doubts upon this subject, but upon the discussion, I think that the rule ought to be discharged. This is to be considered rather as a chattel personal than a chose in action. All chattels personal vest in the husband by the marriage: the latter do not absolutely vest in the husband. The reason appears to be, that choses in action are not assignable by law; and actions upon those instruments must be in the names of the original parties; but a bill of exchange is transferable by indorsement; and an action may be brought upon it in a name different from that of the original payee. But the indorsement by which it is transferred must be made by a person having the disposing power; now after marriage the wife has no such power. That power by the marriage is vested in the husband, and it is unnecessary for him to go through the useless form of indorsing it to himself.

HOLROYD J. If this instrument were a mere chose in action, it would be necessary to have joined the wife. The marriage cannot operate to transfer a chose in action. The principle laid down in the case cited

Q 4

from

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from *Bulstrode* applies to the present case, it is there said by *Doddridge* Justice, to which *Coke C. J.* agreed, "that that which the husband may discharge alone, and of which he may make disposition to his own use, for the recovery of this, he may well have an action in his own name, without his wife." In the case of a chose in action, he cannot dispose of it to his own use: but a bill of exchange is transferable by law. The marriage vested that right of transfer in the husband, and upon that the right of action is consequent. The husband then having the right of disposal, may, according to the rule above laid down by *Doddridge*, sue alone. Upon these grounds, I think the rule for arresting the judgment ought to be discharged.

Rule discharged. (a)

(a) See *Connor v. Martin*, cited in *Rawlinson v. Stone*, 3 *Wils.* 5.

Friday,
Jan. 23d.

MOUNTSTEPHEN and Others against BROOKE
and Others. (a)

Declaration
stated bill of
exchange to be
drawn upon
and accepted by
three persons,
it was proved
to have been
drawn upon
and accepted by
the three jointly
with a fourth.
Held that this
was no variance.

DECLARATION on a bill of exchange drawn in 1807 upon, and accepted by the defendants *Elijah Brooke, James Townsend, and George Brooke*. At the trial before Lord *Ellenborough C. J.* at the *London* sittings after *Trinity* term, it appeared in evidence that in 1807 the defendants were in partnership with *Richard Smith*, and that the bills mentioned in the declaration were in fact drawn upon, and accepted by, the defendants and their deceased partner jointly. The defendants' counsel objected that this was a variance between the contract

(a) Cause was shewn at *Serjeants' Inn*.

proved

proved and declared upon, and Lord *Ellenborough* being of that opinion, the plaintiff was nonsuited. A rule nisi for a new trial having been obtained by *Marryat* in *Michaelmas* term,

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Gurney and *Gaselee* now shewed cause. This is a misdescription of a written contract, which is the foundation of the action. The bill is stated to have been directed to, and drawn upon, three instead of four: a bill accepted by three is very different from one accepted by four; and the declaration affects to describe the bill itself. The bill is the very gist of the action, and not mere inducement, as in *King v. Peppin*, where the precept to the sheriff was only an inducement to the action, and a variance in stating which was held immaterial.

Marryat contra. Where the statement is larger than the proof, that constitutes a variance; but where the proof exceeds the statement, it is no variance; here, if the action had been against the three, and the other partner was alive, the defendants might have pleaded in abatement; but according to the late case of *Richards v. Heather* (a), it is not necessary to declare against these defendants as surviving partners. The distinction, as to what is only inducement and what the gist of the action, does not exist in this case; for the promise may be considered the cause of action, and the bill of exchange as mere inducement. The authorities, however, warrant no such distinction; but the question always is, whether the facts proved satisfy the averment; if they do, it is no objection on the ground of variance, that the statement might have been more full: here the plaintiff has proved all he has stated; that the bill was drawn

(a) *Ant.*, 29.

upon,

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upon, and accepted by, the three defendants; and the fact of another person being also a party to such acceptance is immaterial. In *Williams's Saunders (a)*, a manuscript case of *Evans v. Lewis, E. 1794*, is stated: it was an action against defendant as drawer of a bill of exchange: it appeared in evidence at the trial, that the bill was drawn by the defendant and another jointly. It was objected that there was a variance between the bill proved and the bill declared upon; and the Judge inclining to that opinion, permitted the cause to proceed, with liberty to the defendant to move for a new trial. The Court were afterward of opinion that there was no variance between the bill of exchange proved and that which was declared upon; but that defendant should have pleaded in abatement.

Lord ELLENBOROUGH C. J. That case is quite decisive. Actions on promissory notes, where two jointly and severally promise, and one only is declared against, are of frequent occurrence, and in my experience I have never known an exception taken against that form of declaring, on the ground of variance. The plaintiff has stated enough to charge the persons sought to be charged in this form of action. It is sufficient for him that the bill was drawn upon, and accepted by, the three defendants, and by proving that fact he satisfies the description stated in his declaration. It seems to me, therefore, upon principle as well as authority, that this is no variance, and that the rule for a new trial must be made absolute.

Per Curiam,

Rule absolute.

(a) 291. d. note.

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THEOBALD *against* CRICHMORE. (a)Friday,
Jan. 23d.

TRESPASS for breaking and entering plaintiff's dwelling house, and with an iron crow breaking the outer door, and seizing and carrying away plaintiff's goods, and converting them to his own use. Second count, for seizing and carrying away plaintiff's goods. Plea, not guilty. At the trial before *Dallas J.* at the last assizes for the county of *Essex*, the plaintiff proved that the defendant on the 11th *January*, 1817, with an iron crow, broke open the door of his dwelling and took away his goods. But it appeared that the defendant was a constable, and acted under a warrant of a magistrate, granted under the authority of stat. 53 G. 3. c. 127. s. 7. to levy the sum of 12s. for a church rate. It was admitted that the defendant was not justified by the warrant in breaking the outer door, but it appearing that the action was not commenced until the 9th of *May*, it was objected on the part of the defendant, that the action could not be maintained, because it was not brought within three calendar months after the fact committed, as required by the 12th section of the statute. The learned judge, however, thought, that as the defendant at the time of this trespass was not acting in obedience to the warrant, he could not be considered within the protection of the statute.

Walford, in *Michaelmas* term, obtained a rule nisi for setting aside that verdict and having a new trial; and

(a) Cause was shewn at *Serjeants' Inn*.

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he referred to the 12th section of the statute 53 G. 3. c. 127., by which it is enacted, "That if any action shall be brought for any thing done in *pursuance of that act*, every such action shall be commenced within three calendar months after the fact committed, and not afterwards," he admitted that the constable exceeded his power in breaking the outer door, but he acted at the time in what he supposed to be the execution of his duty, and the object of the statute was to protect constables in a case where they had acted irregularly under a mistaken notion of their duty, and he cited *Gaby v. Wilts and Berks Canal Company. (a)*

Marryat now shewed cause. The legislature has extended the protection of the statute only to such cases where the thing is done in pursuance of the statute. Was the act done here in pursuance of the statute? The duty of the officer is pointed out by the 7th section: the magistrate is authorized by warrant to levy by distress and sale of the goods of the offender the money ordered to be paid. All that the officer, to whom the execution of this warrant was committed, was thereby authorized to do, was to distrain and sell; he had no right to break an outer door for that purpose. That is a distinct substantive trespass, wholly unauthorized by the warrant or the act of parliament; and therefore it is not a thing done in pursuance of the act. The statute only extends its protection to those cases where a person means honestly to execute the authority committed to him, and through ignorance or mistake exceeds his authority; but where he takes upon himself to do a

(a) 3 M. & S. 580.

thing

thing wholly different from that contemplated by his authority, he is not entitled to notice. In *Bell v. Oakley (a)*, the warrant of distress for a poor rate, as in this case, did not authorize the breaking and entering of the house; and the Court held that he was not acting in obedience to the warrant, and therefore that the demand of a copy of the warrant was not necessary.

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LORD ELLENBOROUGH C. J. It is perfectly clear that the defendant had no right to break the outer door for the purpose of executing his warrant of distress. The question is, then, whether he can be said to have acted in pursuance of the statute within the meaning of that term as there used: if it meant only acts lawfully done under the authority of the statute, he would not be protected. But the object was clearly to protect persons acting illegally, but in supposed pursuance, and with a bona fide intention of discharging their duty under the act of parliament. The argument goes to shew, that in every case where the law is exceeded, the officer loses the benefit of the statute: but in those cases only can he require its protection. It was evidently the intention of the legislature to give this protection in a case where he had acted illegally through ignorance or inadvertence. There is no evidence in this case to shew that he acted with any other intention than that of executing the authority delegated to him by the warrant; and I am therefore of opinion that the action is commenced too late, and that this rule should be made absolute.

(a) 2 M. & S. 259.

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BAYLEY J. I am of the same opinion. The act complained of was done by the officer for the purpose of executing the warrant, and for no other purpose; and he was therefore acting as he supposed in pursuance of the statute, and that is sufficient to bring him within the act of parliament. The point decided in *Bell v. Oakley* was, that it was not necessary to demand a warrant where the magistrate could not be liable; but that does not apply to this case. It has been said, that the breaking and entering was a substantive trespass in itself distinct from the act of levying the distress; but it was accompanied with the taking of the goods, which was in execution of the warrant, and therefore it is not true that it is an act totally independent of what was done in execution of the warrant. It appears to me that the officer acted illegally, but in the supposed *bonâ fide* execution of his duty, and that he is therefore entitled to the protection of this statute.

Rule absolute.

Friday,
Jan. 23d.

DOE, on the Demise of STEVENS, against
DONSTON. (a)

The sheriff under a *fi. fa.* seizes a lease, and sells the term before the writ is returnable, but does not execute the assignment to the vendee till a subsequent period: Held that this was a valid assignment.

EJECTMENT. Plea not guilty. At the trial before Lord *Ellenborough* C. J. at the sittings after *Trinity* term, it appeared that the defendants were lessees of the premises in question; and the lessor of the plaintiff claimed as assignee of the sheriff of *Middlesex*, and gave in evidence a judgment obtained in *Hilary* term, 1817, against the defendant for 500*l.* and a *fi. fa.*

(a) Cause was shewn at *Serjeants' Inn*.

issued upon that judgment directed to the sheriff of *Middlesex*, returnable in fifteen days of *Easter* (20th *April*) under which the Sheriffs seized the lease and sold the term; but no assignment was executed until the *third day of June*. It was objected by the defendant's counsel that the power of the sheriff was at an end on the 20th *April*, the day on which the writ was returnable, and that the assignment, having been executed subsequent to that day, was void, and upon that ground the plaintiff was nonsuited. A rule nisi for setting aside this nonsuit having been obtained in last term by *Gurney, Marryat* was now to have shewn cause, but

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LORD ELLENBOROUGH C. J. The sheriff by the writ of *fieri facias* has an authority to sell, and having once seized the goods in execution of the writ, he is bound, even after his general authority has ceased, to proceed to sell, and to do every act necessary to complete the sale. In *Rolle's Abridgement* (a), it is said "that if the sheriff seizes goods upon a *fi. fa.* and be removed before the return of the writ, and afterwards sell the goods, that that is a good sale, and further it is said where a *distringas* issues to the new sheriff to compel the old sheriff to sell, that that does not give him a new authority to sell, but only compels him to do that which he might before have done by law;" and in *Clerke v. Withers* (b), *Holt* Chief Justice says, "the sheriff out of office may sell without a *venditioni exponas*, and a *distringas* does not give him an authority to sell, but is compulsive upon him to sell." From these authorities, therefore, it appears that the power communicated to the sheriff by the *fieri facias* does not even cease upon the expir-

(a) 293, 294.

(b) 6 *Mod.* 295.

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ther on the former occasion they were well or ill founded. That would in fact be trying the former cause over again, and the whole business of an assize might thus be occupied in reviewing the causes tried at the preceding assizes. The learned Judge therefore being of opinion, that it was not for the jury to try whether the cause or occasion for speaking the words was sufficient to warrant them, thought there was nothing to leave to them, even supposing the words to be proved, and nonsuited the plaintiff.

In the last *Michaelmas* term *Raine* moved to set aside this nonsuit, and for a new trial, on the ground that the learned Judge had stopped the cause too soon, and without hearing the evidence, and he contended that it ought to have been left to the jury to say whether the words were pertinent to the matter in issue or not, and he cited the case of *Brook v. Sir H. Montague*. (a) Against which rule cause was now shewn by

Topping, Hullock Serjt., and Littledale. They contended, that it was not necessary to argue that a counsel has a right to say any thing in a cause that he pleases, however scandalous or defamatory it may be: but that on every principle of law it was necessary to shew malice. [Lord *Ellenborough* C. J. The malice in these cases must go to the jury: if so, must not all the facts which tend to prove it go to the same forum? The speaking of words wholly unauthorised would be a circumstance from which malice would be inferred.] The mere inference of malice from the falsehood of the

(a) *Cro. Jac.* 90.

words which in common cases would be sufficient, is not so here. The words were spoken in the course of a cause with reference to facts already proved, and to facts which were to be proved. They were used as observation and inference. In common cases it would be necessary to justify the truth of the words, because if they were not true, the law would imply malice: but here the party may plead the general issue, and no action will lie against him unless actual malice be proved. In *Wood v. Gunston* (a) it is laid down, "that if a counsel speaks scandalous words against one in defending his client's cause, an action lies not against him for so doing, for it is his duty to speak for his client, and it shall be intended to be spoken according to his client's instructions." This falls within the rule which governs the case of a servant, who brings his action against his master for giving him a false character. However false it may be, however injurious to the party, still, unless express malice be proved, the action will not lie, and the defence may be made upon the general issue. In *Weatherston v. Hawkins* (b), *Buller J.* lays down the correct rule: he there says, "in actions of this kind, unless he can prove the words to be malicious as well as false, they are not actionable." The falsehood therefore of the words uttered is not material. In *Edmondson v. Stephenson & Us.* (c), *Lord Mansfield* says, "the gist of it must be malice which is not implied from the occasion of speaking, but should be directly proved. But if without ground, and purely to defame, an action would lie." So also in *Hargrave v. Le*

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(a) *Styles*, 462.(b) 1 *T.R.* 110.(c) *Bull. N.P.* 2.

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Breton (a), and in *Rogers v. Clifton* (b), the same law is laid down. Here the words spoken were material, relevant, and pertinent to the cause, and malice therefore cannot be inferred. If they are not protected by the law, it will be a very great misfortune to the clients of persons placed in similar situations. Every man's efforts will be shackled unless he is to be allowed to make such observations as in the fair and honest discharge of his duty he may think necessary for his client's advantage. In truth, the freedom of speech at the bar is the privilege of the clients, and not of the counsel. It would be impossible for matters properly to be discussed at nisi prius, unless considerable latitude were allowed; and if any evil follow from this, it must be endured for the sake of the greater good which attends it. Here however it is not very material to consider the limits of such privilege; for the defendant is clearly within them. The words in this case were, according to the Judge's report, admitted by the other side to have been used as observations in a cause, and to have been pertinent to the matter in issue. [Lord *Ellenborough* C. J. Certainly the learned Judge had so reported, but Mr. *Raine* does not seem to have apprehended the fact to be so. Perhaps therefore it may be as well to state to us what the circumstances of that case actually were.] On which *Hullock* Serjt. stated the facts of that case from the notes of Mr. Justice *Bayley*, who had tried the cause. These facts were as follows: *Norris v. Cormick*. Action for money had and received. The plaintiff and defendant were both part-owners of a ship called the *Felicity*. The former being entitled to

(a) 4 *Burr.* 24, 25.(b) 3 *B. & P.* 587.

3-8ths, the latter to 1-32d. A person of the name of *Spittal* was also a part-owner. The ship was sold in *September*, 1816, for the purpose, first, of paying the debts due upon her, and afterwards of dividing the surplus amongst the persons entitled to it. She was transferred by a bill of sale to *Robert Bowman* for 610*l.*, and a promissory note payable by instalments, and dated 20th *September*, 1816, was given by *Bowman* to *Spittal* and *Cormick* for the amount. It was agreed by the other part-owners that these two persons should receive the purchase-money, pay the debts, and then divide the surplus amongst the part-owners according to their proportions of interest. *Bowman* paid 30*l.* 10*s.* as a deposit to *Spittal* and *Cormick*, which sum was duly appropriated by them to the payment of the ship's debts. Mr. *Hodgson* was at that time the attorney for all parties concerned; drew the bill of sale to *Bowman*, and the promissory note above mentioned, and was cognisant of all the matter. In the following *January*, *Bowman* paid on the above account 150*l.* to *Hodgson* for *Norris*, and subsequently 63*l.* to *Cormick*. There was a question made at the trial on the cross-examination of *Bowman*, whether the 150*l.* had not been paid by him in consequence of a letter written to him by Mr. *Hodgson*, threatening an action; which letter was shewn to him. *Bowman* however denied having any recollection of this part of the transaction. The action was brought to recover *Norris's* share of the 63*l.* so received by *Cormick*, but *Bayley J.* thought he had already, by receiving the 150*l.*, received more than his share of all that had become due, and that the whole of the 30*l.* 10*s.* first received having been applied to pay debts, *Norris* had no right to call for any proportion of the sum *Cormick*

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nick had received; and therefore, without bearing any evidence on the part of the defendant, directed a nonsuit. *Hodgson* acted as *Norris's* attorney in the cause. [Lord *Ellenborough* C. J. If that be the state of the facts in that case, the words appear to have been very relevant.] The Court then stopping *Littledale*, who was on the same side, called upon

Raine and *Richardson* in support of the rule. They contended that at least it was a question which ought to have been left to the jury. They were to say whether malice could be inferred from the facts or not. But the learned Judge had not left the case to them. The words were too strong, and though there might be no express malice or preconceived ill will on the part of the defendant, yet if the words were wholly unfounded, malice must be inferred. [Lord *Ellenborough* C. J. There are hardly any expressions of discommendation in which there is not some excess. It may not be prudent or correct generally to mix the attorney with his client, but here Mr. *Hodgson* induced a plaintiff to bring an action in which he could not succeed, and though fraudulent and wicked may be stronger words than others would have used, yet as applied to the promissory note, are they not relevant, and if relevant, are they not within the protection of the law?] As to the authority cited by the other side, of *Wood v. Gunston*, it carries the privilege much too far. For if an action be brought against a counsel; then according to that case he is justified, because it will be intended that he spoke by the information of his client, and if an action be brought against the client; he may justify by shewing that he gave no such information to his

his counsel. So that if that case were law, an injured party would be without remedy. There must be some limit laid down. Can it be contended that any thing that has the most remote reference to a case may be said, and that in the most offensive manner? If not, then it ought to be left to the jury, not merely to say whether it was pertinent, but whether it was so pertinent as to be justifiable. The case of a master giving the character of a servant, is that of a private and confidential communication. This is an accusation made injuriously to private character, in a public assembly. The cases therefore stand on different grounds. The case of parliamentary privilege stands also on a wholly different foundation. A member of parliament may, if he thinks it right, cast imputations in parliament against the character of an individual, and still he will be protected. But in that case he is acting in a public capacity, and speaking for the general good of the state; and it is of the utmost importance that full freedom of speech should on such occasions be allowed. It is not contended that there can be no case suggested in which an action can be maintained against a counsel for slanderous words spoken in a cause. It is said that if the words be irrelevant, an action will lie, but that, if relevant, it will not. Then it ought to have been left to the jury, in this case, to say to which of these two classes the words laid in the declaration belonged.

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Lord ELLENBOROUGH C. J. The law privileges many communications which otherwise might be considered as calumnious, and become the subject of an action. In the case of master and servant, the con-

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venience of mankind requires that what is said in fair communication between man and man, upon the subject of character, should be privileged, if made *bonâ fide*, and without malice. If, however, the party giving the character knows what he says to be untrue, that may deprive him of the protection which the law throws around such communications. So a counsel entrusted with the interests of others, and speaking from their information, for the sake of public convenience, is privileged in commenting fairly and *bonâ fide* on the circumstances of the case, and in making observations on the parties concerned, and their instruments or agents in bringing the cause into court. Now the plaintiff in this case was not merely the attorney, but was mixed up in the concoction of the antecedent facts out of which the original cause arose; he was cognisant of all the circumstances, and knew that the plaintiff had no ground of action in that case, in consequence of having already received more than the amount demandable by him. It was in commenting on this conduct that the words were used by the defendant. He had a right so to comment, for the plaintiff was mixed up with the circumstances of the case, and was the agent and instrument in the transaction. The defendant then says, that he is a fraudulent and wicked attorney. These were words not used at random and unnecessary, but were a comment upon the plaintiff's conduct as attorney. Perhaps they were too strong, it may have been too much to say, that he was guilty of fraud as between man and man, and of wickedness in *foro divino*. The expression, in the exercise of a candour fit to be adopted, might have been spared. But still a counsel might *bonâ fide*

think

think such an expression justifiable under the circumstances. If the plaintiff knowingly placed the party in the original case in a situation where he must be a sufferer without any benefit, it does seem to give a colour to the charge of being fraudulent and wicked; at least I cannot say that there was no reasonable or probable cause to induce such a conclusion. It may be urged that these facts did not occur at the trial. But an admission was made at the assizes which, coupled with the actual facts now disclosed, seems to warrant the conclusion at which the learned judge then arrived. It appears to me that the words spoken were uttered in the original cause, and were relevant and pertinent to it, and consequently that this action is not maintainable.

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BAYLEY J. The rule seems to me to be correctly laid down in *Brook v. Sir Henry Montague* (a), "that a counsellor hath a privilege to enforce any thing which is informed unto him for his client, and to give it in evidence, it being pertinent to the matter in question, and not to examine whether it be true or false." No mischief will ensue in allowing the privilege to that extent. Now it is pertinent to the cause for counsel to comment both on the facts proved and on those which he might expect to be proved. And that, as the learned Judge has stated, was the case here. We might indeed fairly suppose that the counsel who had been personally engaged in the former trial, and were well acquainted with all its circumstances, would make an admission to that extent. I was, however, desirous of adverting to the real facts of the former cause; for the propriety of the

(a) *Cra. Jac.* 90.

defendant's

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defendant's conduct must depend upon the circumstances which then occurred, and not on facts subsequently proved tending to explain or justify the present plaintiff's conduct on that occasion. Now, from the facts in that case it appears, that although there were perhaps harsh expressions, still the defendant was, at least, warranted in saying that the endeavouring to obtain money by bringing that action was fraudulent and knavish; and he might fairly argue thus, "Don't let me cast the imputation on the wrong person. The plaintiff *Norris* might not know the exact state of the case, but *Hodgson* his attorney must; he was acquainted with the law, and must have known the circumstances and their legal consequences;" then although the expressions are harsh, still they are within the privilege of a counsel. It may be observed that these are not facts of a calumnious nature stated by the defendant, but are epithets attaching on the conduct of the plaintiff from facts proved in the cause. If those epithets were not warranted, the judge in his summing up at the trial might set it right. There were facts in this case which would warrant strong expressions on the part of the defendant. I think, therefore, that in using the words imputed to him he acted within the limits which the law permits, and that he is not liable to an action.

ABBOTT J. The words spoken in this case appear to relate to the plaintiff as attorney in a former cause, to a promissory note, and to the obtaining of a sum of money for the plaintiff there. The Judge reports to us that the words were used in an address to the jury by the defendant as counsel; and that he understood it to be admitted that they were pertinent to the cause. It is suggested

suggested to us that this admission has been taken too largely: we have therefore looked into the facts of the first cause, and we find them such that an admission to the effect stated by the learned Judge might very properly have been made. It is obvious that the words were spoken of the plaintiff, not merely as attorney, but as having personally involved himself in the circumstances of that case: they were spoken in a course of judicial enquiry, and were relevant to the matter in issue. I am, therefore, of opinion, that no action can be maintained, unless it can be shewn that the counsel availed himself of his situation maliciously to utter words wholly unjustifiable. It would be impossible that justice could be well administered, if counsel were to be questioned for the too great strength of their expressions: here the words were pertinent, and there is no pretence for saying that the defendant maliciously availed himself of his situation to utter them.

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HOLROYD J. I am of the same opinion, that this action is not maintainable. The words were spoken in a case after the evidence was given, upon which they were a comment. The jury had heard the facts, and were capable of judging of the accuracy of the comment which was made for the purpose of shewing to them the view which the defendant took of all the circumstances which had appeared in that case. It is stated by Lord C. B. *Comyns* (a), "that words which denote opinion or suspicion are not actionable:" Here the words denote only the opinion of the speaker, and were addressed to the jury, intending to convey to

(a) *Com. Dig. Action on Case for Defamation*, F. 13.

their

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their minds the same opinion. I apprehend that a counsel is in the same situation and under the same protection as the party himself, with this exception, perhaps, that a party from his comparative ignorance of what is, or is not relevant, may be indulged in a greater latitude, and not be restricted within the same limits as a counsel, whose superior knowledge of itself should be sufficient to restrain him within due bounds. But, strictly speaking, they stand upon the same foundation: it may, therefore, be fit to enquire, how the parties themselves are protected. In 1st *Hawkins, P. C. (a)*, it is laid down, that "no false or scandalous matter contained in a petition to a committee of parliament, or in articles of the peace exhibited to justices, or in any other proceeding in a regular course of justice, will make the complaint amount to a libel." And in *Rolle's Abridg. (b)*, "a case is stated in which it was holden in arrest of judgment, that an action was not maintainable where the words were spoken by the party in defence of himself, "and in a legal and judicial way," by which I understand that they were spoken in a court of justice; and there, too, the words were charged, and were found by the verdict for the plaintiff, to have been spoken falsely and maliciously, which makes it a very strong case. *Lake v. King (c)* is an authority to the same effect. In *Buckley v. Wood (d)*, the libel was contained in a bill in the Star-chamber, against Sir R. Buckley, charging him with divers matters examinable in that court, and also that he was a maintainer of pirates and murderers, and it was there resolved per totam curiam, "that

(a) *G. 73. s. 8.*(c) 1 *Saund.* 130.(b) 87 *Pl.* 4.(d) 4 *Rep.* 146.

for any matter contained in the bill that was examinable in the said court, no action lies, although the matter is merely false, because it was in the course of justice; and this agrees with the opinion in 11 *Eliz. Dyer*, 285., and with the judgment in *Cutler v. Dixon's* case (a), but that for the latter words, which were not examinable in the said court, an action on the case lies, for that cannot be in a course of justice." (b)

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(a) 4 *Rep.* 14.

(b) In the case of *Astley v. Young*, 2 *Burr.* 807., the declaration charged that the defendant did maliciously make, exhibit, and publish to the Court of *B. R.* a malicious, false, and scandalous libel, contained in an affidavit, in which there were certain false, malicious, and scandalous matters; and plea, that defendant made the affidavit in his own defence, against a complaint made to the Court against him, for his refusal to grant an ale licence; and in answer thereto, and to an affidavit of the plaintiff; general demurrer and joinder. And after argument, in the course of which defendant's counsel urged, that the plaintiff admitted the charge, that the affidavit was made maliciously, judgment was given for the defendant. This is a strong authority to shew that an action, as for defamation, although the words were maliciously spoken or written, does not lie, where they were spoken or written in a course of justice. The case cited by Mr. Justice Holroyd, from 1 *Roll. Abr.* pl. 817. (which is also to be found in *Str W. Jones*, 431. and *March*, 20. pl. 45.) is another authority to the same effect. The case, as stated in *Rolle*, is this: In an action on the case, by *A.* against *B.* plaintiff declared that he took his oath in *B. R.* against *B.* of certain matters to bind him to his good behaviour, and thereupon *B.* then said falsely and maliciously, intending to scandalise the plaintiff, "there is not a word true in that affidavit, and I will prove it by forty witnesses." On motion in arrest of judgment, (the jury having by their verdict found the words to be false and malicious,) it was holden by the Court that the action was not maintainable; and the reason given was, "that the answer which *B.* made to the affidavit was a justification in law, and spoken in defence of himself, and in a legal and judicial way." This case also shews that words, although false and malicious, (if spoken in a course of justice,) are not the subject of this species of action. Upon the authorities therefore it is at least questionable whether such an action can be maintained in any case against a party for words spoken or written in a course of justice. Is not the proper form of remedy a special action on the case; in which it should be expressly charged, that the imputation was made falsely and without reasonable or probable cause? In other cases of injuries arising

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These cases shew the privilege possessed by parties themselves; and from these authorities it appears that no action is maintainable against the party, nor consequently against the counsel who is in a similar

out of the improper use of criminal or civil proceedings, the party complaining is bound to allege and prove that the prosecution or action was instituted against him maliciously, and without reasonable or probable cause; and in *Johnstone v. Sutton*, 1 T. R. 544, 545., it is laid down that that is the essential ground of any action for a false, malicious, and defamatory charge, made in a legal prosecution. The burden of proving the want of reasonable or probable cause is thus thrown upon the party complaining, the law considering the circumstance of the act having been done under the sanction of legal proceedings, as *prima facie* evidence that it was done for sufficient cause, and upon proper motives. In the case of an action for a malicious arrest, the issuing of the writ is the only circumstance from which such a presumption arises; with how much greater force does the principle apply to a case where the party, having proceeded through the intermediate steps of the cause, has arrived at his trial, and is in the act of addressing the jury, in the presence of the judge, by whom he may be restrained in the use of any irrelevant matter; and in the presence of the adverse party, who has the opportunity of giving him an immediate answer. A man's voluntarily placing himself in such a situation, raises the strongest presumption that he is using legal proceedings only for legitimate purposes. In *Lord Beauchamp v. Sir R. Croft, Dyer*, 285. a. it was holden that an action of scandalum magnatum would not lie for bringing a writ of *forger of false deeds* against a peer; and in the common case of a false and malicious charge of felony, exhibited before a justice of the peace, an action upon the case, as for defamation, will not lie; but the party complaining is bound to allege and prove that the charge was made maliciously, and without reasonable or probable cause. This is at least one instance of a party conducting his case before a competent tribunal, and therein using words false and malicious, where this species of action will not lie; and from this it would seem that such an action cannot be supported, for words false and malicious, spoken by a party conducting his own case before a court of competent jurisdiction; and if a counsel be in the same situation as the party, then such an action cannot be supported against a counsel. From the authorities therefore, the reason of the thing itself, and from analogy to cases of a similar description, there does appear to be some ground at least for doubting whether an action upon the case, as for defamation, is the proper form of remedy against a party or a counsel for words spoken or written in the course of any judicial proceeding.

situation,

situation, for words spoken in a course of justice. If they be fair comments upon the evidence, and be relevant to the matter in issue, then, unless express malice be shewn, the occasion justifies them. If, however, it be proved that they were not spoken *bonâ fide* or express malice be shewn, then they may be actionable; at least our judgment in the present case does not decide that they would not be so.

Rule discharged.

BEAUMONT and Wife *against* FIELD. (a)

Friday,
Jan. 23d.

TRESPASS for breaking and entering coal-mines.

Plea, not guilty. At the trial before the Lord Chief Baron at the last assizes for the county of *York*, it appeared that the mine where the trespass was alleged to have been committed before *July*, 1790, was the property of *Sir Thomas Blackett*, and formed part of what was called his *Wibsey* estate. The plaintiffs, as his devisees, now claimed the same: the defendant *Field* had given directions for doing the acts which were the trespasses complained of in the declaration; and he gave these directions as the agent of *Jarratt* and *Hardy*, who were engaged in working the mine, and claimed to be entitled to the same under deeds of lease and release made in *July*, 1790, by which *Sir T. Blackett*, among other things, granted to them all the coal-mines at *Cold Harbour* farm, and also in the several lands then in the tenure and occupation of *Widow Kellett* and son, and others, naming

Where a deed purported to grant all the coal-mines in the lands in the occupation of *Widow K.* and son, and the grantor had not at that time any lands in the occupation of *Widow K.* and son; and the deed was founded upon a contract of sale executed some months before, to which the grantor's land steward was the subscribing witness: Held that, for the purpose of explaining the latent ambiguity in the deed, letters written by the latter

to the grantees, respecting the sale to them by the grantor of the coal mines in the deed, and purporting to be written by his directions, were admissible evidence, without shewing an express authority from the grantor to write them.

(a) Cause was shewn at *Serjeants' Inn*.

the

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the rest of his *Wibsey* tenants. At the date of the deed there was no land in possession of persons answering the description of Widow *Kellet* and son; although the mine in question was under lands then in the possession of a *J. Kellett*, who was the son of a Widow *Kellett*; and these lands lay contiguous to *Cold Harbour* farm. To explain this latent ambiguity in the deed, the defendant gave in evidence an agreement, made the 23d of Dec. 1789, attested by *L. Noble*, (who at that time was Sir *T. Blackett*'s land steward,) by which *Jarratt* and *Hardy* contracted for the purchase of all the coals at *Cold Harbour* farm, and in the lands and grounds occupied by the Widow *Kellett* and son, &c.; and then further to shew what Sir *T. Blackett* intended to include under the words "lands occupied by the Widow *Kellett* and son," they offered in evidence two letters from *Noble*, addressed to *Jarratt*, the one bearing date the 31st October, and the other on the 18th December, 1789, only a few days before the date of the agreement. In the first he stated that he had spoken to Sir *T. Blackett* about the coal in the farms at *Cold Harbour*, &c. at *Wibsey*, and that he had no objection to sell them to *Jarratt* upon certain terms therein specified; and he concluded by desiring an answer. In the second letter he desires *Jarratt* and *Hardy* to call upon the following *Wednesday* (which was the 23d Dec.) or *Thursday*, when he had Sir *T. Blackett*'s order to say he would be at home. The learned Judge, however, rejected these letters; and the plaintiffs having obtained a verdict, *Hullock* Serjt. in *Michaelmas* term obtained a rule nisi for a new trial, on the ground that these letters ought to have been received in evidence. And now

Topping, *Scarlett*, and *Richardson* shewed cause. These letters were not admissible evidence until it were
shewn

shewn that *Noble* had a general authority to treat for the sale of lands or coals, or an express authority to write these letters. A land agent, as such, has not necessarily the power of binding his principal by contracts for the sale of lands or coals, &c. A previous authority, or a subsequent adoption of his acts, must therefore be shewn. But, secondly, the letters were not offered in evidence to explain the state of the occupation at the time of the execution of the deed: the thing to be explained was, what was meant by the words "*lands now in the occupation of the widow Kellett and sons.*" but these letters could only shew at most, that in an earlier stage of the contract, nearly nine months before the execution of the deed, it was in contemplation to convey the coal mines in the place in question; but they cannot by any means tend to explain a deed which was not executed till after a lapse of several months.

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Hullock Serjt., Littledale, and Tindal, contra. From the nature of the thing at this distance of time, it is next to impossible to shew an express authority; but such an authority must be inferred from the relative situation of the parties. Although in cities or towns the solicitor may be the fitter person to apply to on the subject of the sale of lands, &c., in the country, land agents or stewards are more generally referred to: from his situation, therefore, and the fact of his being a witness to the agreement of purchase, a previous authority may fairly be implied; but Sir *T. Blackett* has at all events fully recognized *Noble's* authority by adopting, as the basis of the deed, the very agreement of purchase to which *Noble* was a witness, and to explain which, his letters written a short time before were offered in evidence. Then assuming that he had authority to write

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these letters, it is said that they are not receivable in evidence, because they were not written near the time when the deed bore date; but in this case there being no persons in possession of the lands who answer the description of widow *Kellett* and son, the question is, what lands were meant to pass by those words; and that forms a latent ambiguity, and then parol evidence is admissible; and they cited *Doe, demise of Chichester, v. Oxendon (a)*, and referred to the opinion of the Judges as there delivered by *Gibbs C. J.*; and if parol evidence is admissible to explain the deed, then all evidence tending to give the explanation required may be received. The circumstance of the letters having been written long prior to the execution of the deed, may diminish the value of the evidence with reference to the purpose for which it is produced; but if it be calculated in any degree, however small, to explain the deed, it is admissible, and the jury are to pass their judgment upon its value.

LORD ELLENBOROUGH C. J. I am of opinion, that these letters ought to have been received in evidence, and therefore there must be a new trial. *Noble* stood in the situation of receiver of rents to the estate of Sir *T. Blackett*, and was therefore most likely to be conversant with the property: he had been steward for a considerable time, and continued to be so up to the time of the execution of the agreement: he was the subscribing witness to it, which at least shews that he was conversant with the whole transaction: the contents of the letters themselves are corroborative of this, inasmuch as they relate to the subject of the agreement, and state the orders of Sir *T. Blackett* upon it; and it

(a) 4 *Dow's Rep.* p. 65.

is allowable to refer to them now, inasmuch as at the trial the nature of their contents must have been opened by the counsel, who offered them in support of his case. *Noble*, therefore, standing in this situation to Sir *Thomas Blackett*, I think his letters were admissible: I will not say what would be their effect, if admitted; it is not necessary for me to do so; it may be equivocal: if however they were admissible, then the attention of the jury has not been drawn to them, and the party is entitled to have them exhibited to another jury, who are to pronounce upon the whole of the case.

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BAYLEY J. I am of the same opinion. The letters themselves shew that the steward was the medium of communication between Sir *T. Blackett* and the grantees; they ought therefore to have been received in evidence. I forbear to say what their effect would be if they had been admitted. If the Judge in his summing up had then stated them to be of no weight, a bill of exceptions might have been tendered to him, and the party might have had the judgment of a court of error upon the point. This advantage however he has lost by the rejection: I therefore think on this ground that there ought to be a new trial.

ABBOTT J. I am of the same opinion, that the letters in this case ought to have been received; and I think that the contents of the letters, connected with the character and situation of the writer, and his being afterwards the subscribing witness to the agreement, shew sufficiently that they were written with the knowledge and authority of Sir *T. Blackett*.

HOLROYD J. concurred.

Rule absolute.

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Friday,
Jan. 23d.

Where a legal objection is taken at the trial, and overruled by the Judge, without reserving the point, and the Court are afterwards of opinion that that objection was a good ground of nonsuit, they will grant a new trial only, and will not permit a nonsuit to be entered.

MINCHIN and Another against CLEMENT. (a)

A RULE having in this case been obtained in *Michaelmas* term, to set aside the verdict for the plaintiff, and to enter a nonsuit or have a new trial, and the case now having been argued the Court were clearly of opinion that the verdict ought to be set aside on the ground that the direction of the learned Judge was wrong in point of law; but, inasmuch as no leave was given at the trial to enter a nonsuit, they were about to direct the rule to be drawn up for a new trial, but

Gaselee contended, that inasmuch as the objection was made at the trial, and the Court were now of opinion that such an objection was fatal to the plaintiff's right of recovery, the defendant ought to have the benefit of a nonsuit at once, without going down to a second trial; and although he could not cite any case at that moment upon the subject, still he stated that he believed there were cases in which the judge had not reserved the point, and yet the Court had directed a nonsuit to be entered.

LORD ELLENBOROUGH C. J. It is in the plaintiff's option to be nonsuited or not; and if at the trial he had refused to be nonsuited, and the Judge had then directed the jury to find a verdict against him, it was competent to the plaintiff to have tendered a bill of exceptions, of which advantage he would be deprived

(a) Cause was to have been shewn at *Serjeants' Inn*.

if the Court were now to direct a nonsuit to be entered. We are, therefore, of opinion that the rule should be made absolute for a new trial only.

Rule absolute.

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MINCHIN
against
CLERMONT.

BROWN against OTTLEY. (a)

Friday,
Jan. 23d.

TINDAL in last term, obtained a rule for setting aside the nonsuit in this case, on an affidavit stating in substance as follows. The plaintiff carried down the record to the last assizes for the county of *York*, which he entered in the marshal's list at a considerable distance from the first cause. The defendant also carried down the same record by proviso, which he entered in the marshal's list of causes, as No. 1. When the cause was called on as the first cause, the plaintiff appeared and stated that he was not then ready to try it, but should be ready when it came on in due course as he had entered it; insisting then, as he did now before the Court, that by the rule of court (*b*), if both the plaintiff and the defendant took down the record, the trial should be by the plaintiff's record if he entered it with the marshal, and that the defendant could only insist upon proceeding on *his* record where the plaintiff had neglected to enter his record. The cause, however, was called on as No. 1., and the plaintiff, not appearing, was nonsuited. It appeared by *Tindal's* affidavit, that the defendant had given due notice of trial, but that the plaintiff, thinking the defendant's notice

Where the plaintiff having omitted to give due notice of trial, enters his record in the marshal's book, subsequent to the entry of the defendant's record by proviso upon which due notice of trial has been given; it was holden that the defendant had a right to go to trial on his record, and that the plaintiff, not having then appeared, was properly nonsuited.

(a) Cause was to have been shewn at *Serjeants' Inn*.

(b) *R. M. 4 Ann. 2 Tidd's Pract. 318.*

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sufficient, had omitted to give any until a few days before the assizes.

The case being now called on,

The Court said that as the plaintiff had not given proper notice of trial, the entry of his record was a misentry and of no effect; that the rule in *M. 4 Anne*, applied only to cases where both the plaintiff's and defendant's records were carried down in a triable shape. The only record so carried down in this case, was that by proviso. The trial was therefore properly had upon that record, and the plaintiff not then choosing to appear, the nonsuit was right. The Court, however, set aside the nonsuit upon payment of costs, and on the plaintiff's peremptorily undertaking to try at the next assizes.

Saturday,
Jan. 24th.

EDWARDS against SUSANNA BETHEL, Executrix
of R. BETHEL, deceased.

Where an executrix pleaded, 1st, Non-assumpsit; 2d, Ne unques executrix; and 3d, Plene administravit; and issues on the first pleas were found for plaintiff, and on the last for defendant; it was holden that the last plea, being a complete answer to the action, the defendant was entitled to the general costs of the trial.

ASSUMPSIT on promises made by *R. Bethel* in his life-time, and also on promises by defendant since the death of the said *R. Bethel*. Plea first, non-assumpsit, by *R. Bethel*, deceased, or the defendant since his death. Secondly, ne unques executrix, and Thirdly, plene administravit. Upon all these pleas issue was taken and joined, and a verdict was found for the plaintiff on the two first issues; and for the defendant on the last, and the postea was delivered to the plaintiff.

Gaselee

Gaselee, in last term, obtained a rule to shew cause why the postea should not be delivered to the defendant, and why the master should not be at liberty to tax the general costs in the cause for the defendant, on the ground, that the issue on the plea of plene administravit, which was a bar to the action, having been found for the defendant, the latter was entitled to general costs, and he said that in *Hogg v. Graham* (a), the court of C. P. held a defendant in such a case, entitled to his costs, and that *Garnans v. Hesketh*, and *Cockson v. Drinkwater* (b), were authorities to the same effect.

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Manning now shewed cause. The question in *Hogg v. Graham* was the same as had been decided in *Cockson v. Drinkwater* and *Garnans v. Hesketh*, which decisions were recognized in *Hindsley v. Russell* (c). But the dictum at the end of the case cited from the common pleas, in which the plea of plene administravit is put on the same footing as a justification in trespass, is inconsistent with *Hindsley v. Russell*. A verdict for the defendant, on a justification in trespass, shews that the plaintiff had no cause of action; but the plea of plene administravit merely goes in protection of the assets, and admits the cause of action, upon which admission the plaintiff may, after a verdict for the defendant, have a scire facias against the future assets, and for that the year books were referred to. (d) In *Hindsley v. Russell*, the defendant pleaded first, non-assumpsit, secondly, plene administravit, and thirdly, plene administravit ultra debts by specialty. Issues were joined

(a) 4 Taunt. 135.

(b) 2 Tidd's Pract. 1014.

(c) 12 East, 232.

(d) 33 H. 6. 24. 34 H. 6. 24. d.

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against
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upon the first two pleas, and upon the last the plaintiff took judgment of assets in futuro. In that case this court held, that the plaintiff being at all events entitled to judgment of assets quando, and having been compelled by the plea of non-assumpsit to go down to trial, was entitled to the general costs of the cause. And there the plea of plene administravit was found for the defendant, so that if the issue on that plea had been considered by the Court as having the same effect as an issue on a justification in trespass, the defendant would have been entitled to the general costs of the cause notwithstanding the judgment taken on the third plea. That case is therefore directly in point. Besides, here the defendant has put upon the record, ne unques executrix, a plea false within her own knowledge, and has thereby rendered herself liable for *debt* and costs, *de bonis propriis*. (a) This liability being perfectly collateral to the question, as to the sufficiency of the assets, the verdict for the plaintiff on the second issue, rendered it immaterial to enquire whether the defendant had fully administered or not.

LORD ELLENBOROUGH C. J. The defendant has obtained a verdict upon an issue taken to a plea which is an unqualified bar to the action, and which if pleaded alone, would clearly entitle her to the general costs of the trial, and if that be so, she ought not to be placed in a worse situation by having pleaded several pleas, than she would have been if she had pleaded only one. The plea of plene administravit being therefore of itself a full and complete answer to the action, the defendant

(a) 1 Wms. Saund. 336. b.

is in my opinion entitled to the postea, and to the general costs of the trial.

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BAYLEY J. I am of the same opinion. Although the defendant by pleading two unnecessary pleas, may have subjected herself to the costs of the issues arising out of those pleas, yet she is entitled to the *general* costs of the trial. The plea of plene administravit, is a plea in bar, and the issue upon that plea is found for the defendant, and if she had gone to trial upon that issue alone, there would have been a verdict against the plaintiff, and a judgment against him. It is true it would be a judgment subject to be opened by scire facias, but the plaintiff still would have had his costs; the defendant then by pleading double, ought not to lose any advantage that she otherwise would have had by pleading single. The fact of having pleaded several matters can make no difference as to the plea upon which she has succeeded. The plaintiff here claims payment only out of one fund, viz. the assets of the testator, and the defendant by proving that those are fully administered, shews that there is no such fund out of which the plaintiff's demand may be satisfied. It has been said that the defendant having pleaded a plea false within her own knowledge, has thereby subjected herself to the general costs, but it seems to me, that that can make no difference, inasmuch as that plea is joined with another which goes in bar of the whole action. I am therefore of opinion that the defendant is entitled to the general costs, and that this rule ought to be made absolute.

ABBOTT and HOLROYD Js. concurred.

Rule absolute.

Gaselee and *Casberd* were to have supported the rule.

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Saturday,
Jan. 24th.

SAUNDERS *against* NEWMAN.

The occupier of a mill may maintain an action for forcing back water and injuring his mill, although he has not enjoyed it precisely in the same state for 20 years; and therefore it was holden to be no defence to such an action that the occupier had, within a few years, erected in his mill a wheel of different dimensions, but requiring less water than the old one, although the declaration stated the plaintiff to be possessed of a mill, without alleging it to be an ancient mill.

THE declaration stated, that plaintiff was possessed of a water-mill, with the appurtenances, &c., in which mill he had used, exercised, and carried on, and still of right ought to use, exercise, and carry on the trade and business of a miller; and that the defendant was possessed of another mill and mill-pond, and that the water of a certain stream from time immemorial had flowed, and still of right ought to flow in its usual channel unto the mill of the plaintiff, and from thence unto the mill and mill-pond of defendant, and from the mill and mill-pond of defendant in its usual channel, without being penned or forced back so as to occasion any injury to the plaintiff's mill; yet the defendant, well knowing the premises, wrongfully kept and continued a hatch-dam or mill-head of and belonging to his mill-pond, raised to a much greater height than the same had theretofore been, whereby large quantities of water of the stream which ought to have flowed and escaped from and out of the defendant's mill and mill-pond in its usual channel below the same mill, and away from the mill of plaintiff, was greatly prevented from flowing and escaping from the mill and mill-pond of defendant, as the same otherwise would have done, and by reason of such obstruction quantities of the water and stream were penned and forced back against the wheel of the plaintiff's mill, whereby plaintiff was prevented from working his mill, to his damage, &c. Plea, general issue. At the trial before Mr. J. Burrough at the last assizes for the county of *Wills*, it

appeared in evidence that the plaintiff's mill was built on the site of an old mill which had existed in that spot for a space of at least forty years before. In 1801 this old mill was burnt down, and the plaintiff then built the present mill, with a wheel of the same dimensions and on the same level with the former one. Since that period, however, he had erected a new wheel of different dimensions, but requiring less water. The level of the water however continued the same. It was for an injury to this last wheel that the action was brought. Upon these facts the learned Judge was of opinion, "that as this was an action founded on the plaintiff's possession, and for an injury to that possession, and as he had not enjoyed his mill in the state in which it was when the injury was sustained for the space of twenty years, he was not entitled to recover: that if the mill had remained in the state in which it was when rebuilt in 1801, he would have been entitled to maintain his action for an injury, but he thought fit to alter it, and to make a new wheel so materially different from the former, that the evidence of his right was gone; and this being his own voluntary act, the learned Judge thought that he could not maintain the action on the ground of possession, for he could only support it by a medium of proof, not that this was the same wheel, but that if the old wheel had remained, the acts of the defendant would have injured him in that state." On this the plaintiff was nonsuited, and a rule having been obtained last term by *Gaselee* for setting aside this nonsuit,

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Pell Serjt. and *Casberd* shewed cause. The plaintiff having declared merely on his possession cannot maintain

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tain this action against the defendant, who appears upon the evidence to have had an ancient mill. To support this action, the plaintiff must either shew that his own mill was an ancient mill, or must set forth some prescriptive right as in an action for infringing a right of common, or for not grinding corn at a particular mill. In each of these cases a prescriptive right must be shewn. Reasoning therefore from analogy, it must be inferred that this action being for an infringement on a mode of enjoying a mill, which mill is not claimed by prescription, cannot be supported. In *1 Rolle's Abridg.* p. 107. pl. 16. it is said, "If I have a mill by prescription, and another erect a new mill, and force back the water on my mill so as to do me an injury, I may have an action on the case." From which it is to be inferred that the person bringing such an action must have a prescriptive right to the mill: no such right is claimed by the plaintiff in this case, although he does claim a prescriptive right to the water.

Lord ELLENBOROUGH C. J. The plaintiff in this case has declared that he was possessed of a mill, and that the water has been used to flow in a particular manner. Now if by any alteration lower down the stream the water be prevented from escaping, as it has usually done, and that be to the prejudice of the owner of the mill, it seems to me to form the ground of an action against the party so obstructing the water. If indeed the plaintiff had stated in his declaration his right to be in respect of a mill of a given construction, the result might have been different; but in the present case there must be a new trial.

BAYLEY J. I do not see how the alteration of the wheel can make any difference in this case; at least so far as to withdraw it from the consideration of the jury. It seems to me that all the allegations in the declaration were proved: the plaintiff proved that he was possessed of a mill, and that the water had flowed from time immemorial in a particular channel, and that the defendant had obstructed it. The objection therefore, if any, must be upon the record. If a person stops the current of a stream which has immemorially flowed in a given direction, and thereby prejudices another, he subjects himself to an action. I therefore think that there must be a new trial.

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ABBOTT J. When a mill has been erected upon a stream for a long period of time, it gives to the owner a right that the water shall continue to flow to and from the mill, in the manner in which it has been accustomed to flow during all that time. The owner is not bound to use the water in the same precise manner, or to apply it to the same mill: if he were, that would stop all improvements in machinery. If, indeed, the alterations made from time to time prejudice the right of the lower mill, the case would be different; but here the alteration is by no means injurious, for the old wheel drew more water than the new one. I therefore think that in this case the nonsuit should be set aside.

HOLROYD J. The rule laid down in *Bealy v. Shaw* (a) by Mr. J. *Le Blanc* is this, "that after the erection of works, and the appropriation by the owner of the land

(a) 6 *East*, 219.

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of a certain quantity of the water flowing over it, if a proprietor of other land afterwards take what remains of the water before unappropriated, the first-mentioned owner, however he might before such second appropriation have taken to himself so much more, cannot do so afterwards." The defendant therefore had no right to use the water in this case after the erection of plaintiff's mill, in a different manner than it had been accustomed to be used before; for at all events by that act the plaintiff appropriated to himself the water flowing in that particular way. Now the water used to flow without the obstruction complained of. The defendant therefore can have no right to turn the water back upon the plaintiff's mill. The change of the wheel can make no difference; because at the time it was done it was certainly lawful for the plaintiff to make the alteration. Then if that be so, the defendant by his subsequent act cannot deprive the plaintiff of an advantage which he had already lawfully acquired. I am therefore of opinion that the nonsuit must be set aside.

Rule absolute. (a)

Gaselee was to have supported the rule.

(a) See *Luttrell's case*, 4 Rep. 87.

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The KING *against* The Company of Proprietors
of the CALDER and HEBBLE Navigation.

Wednesday,
Jan. 28th.

UPON hearing the appeal of the company of proprietors of the *Calder* and *Hebble* navigation against a rate made for the relief of the poor of the township of *Alverthorpe* with *Thornes*, whereby the said company stood rated as follows :

	l.	s.	d.
The Company of Proprietors of the <i>Calder</i> and <i>Hebble</i> Navigation, for the land occupied by the canal and banks	-	-	5 0 0
House of lock-keeper and garden occupied therewith	-	-	0 10 0

Where a statute empowered the proprietors of a canal to take rates in respect of vessels navigating the same, and expressly exempted such rates from the payment of all taxes, rates, &c. it was holden that the land occupied by the canal was also thereby exempted from poor's rate.

The sessions confirmed the rate, subject to the opinion of this Court upon the following case :

By an act passed in the ninth year of the reign of his present Majesty relating to the said navigation, the said Company of Proprietors were empowered to take rates and duties in respect of vessels navigating the canal ; and it was thereby enacted that the said rates or duties should at all times thereafter be exempted from the payment of any taxes, rates, assessments or impositions whatsoever any law or statute made or to be made to the contrary thereof notwithstanding, but the act did not contain any express exemption of land taken by the Company for the purpose of the navigation from the payment of rates and taxes *as land*. The quantity of land within the township of *Alverthorpe* with *Thornes* taken by the proprietors of the navigation by virtue of the powers given them by the

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act for that purpose, and upon which they made a lock and a cut or canal and banks to the same was about six acres, and of the full value of ten pounds per annum, if occupied in like maner as the other land within that township. Before the land was so taken by the proprietors it was rated and assessed as other lands within the township, to the poor and other rates. The proprietors built a lock-house upon part of the lands, and the same was occupied by their lock-keeper together with other parts of the land as a garden to the house, and for which house and garden the Company agreed to pay a proportion of the rate, resisting only the rate upon the land covered with water, and that which was used merely for the towing path and banks; from which the proprietors derived no other emolument than the rates and duties. The Sessions being of opinion that notwithstanding the exception the said company of proprietors were liable to be rated and assessed to the relief of the poor for the land in question *as land*, confirmed the rate.

Richardson and *E. Alderson* in support of the order of sessions. Before the passing of the 9 G. 3. the land now occupied by the canal was productive of rates to the town. The Company have taken this under the act, and it is in its present state productive of profit. It may be said, however, that this profit is exempted from rates; but it is observable that there is no special exemption of the land: and the section relied upon by the other side, which is to be found in the *Leeds* and *Liverpool* canal act, seems to have been there inserted by the legislature *ex abundanti cautela*. When this act passed, it was not settled law that tolls per

per se were not rateable. The exemption here must be construed reasonably; the canal company have land within the township, and that land is productive. The sessions have stated that occupied as other land it would be of the value of 1*cl.* per annum. In *Rex v. Dock Company of Hull* (a), the act made the dock shares there rated personal property, and although personal property was not rated in that town, and the dock shares were inserted in the rate as land, the Court there held that the statute must be construed reasonably, and that the shares must notwithstanding be subject to the rate. So here, this exemption must be construed reasonably, and not according to the strict letter; and the reasonable construction is that the tolls shall be exempted from taxation to their full extent, but that the land occupied by the company shall pay the same rates as it did before. The exemption in this case differs from that in the *Leeds* and *Liverpool* canal act for this reason, that the navigation was a river navigation, made for the purpose of rendering navigable the old bed of the river which before the act was not rateable, but the *Leeds* and *Liverpool* canal was cut entirely through land previously rateable, and the attention of the legislature was more likely to be called to the exemption which would therefore be more precise in its terms, although in substance the same. In *Rex v. Scolcoates* (b), no profit was received within the parish, and indeed the trustees there were public officers receiving no private benefit for themselves. This case is not easily distinguished from *Rex v. Gardner*. (c) The areas rated in that case produced no profit per se, they

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(a) 1 T.R. 219.

(b) 12 East, 40.

(c) Comp. 79.

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were merely conducive to the convenient occupation of the other premises, yet they were held rateable; now here, taking the argument on the other side in its full extent, the exemption of the rates and duties does but make the land unproductive of profit per se; it may still, however, be conducive to the convenient occupation of the other premises belonging to the company, which are mentioned in the case; and if so, then the rule laid down in *Rex v. Gardner* will apply, and the Court will not enter into the quantum, which was a question for the sessions.

Topping and Scarlett, contra. To render property rateable it must produce profit, and be locally situate within the parish: it is stated in this case that the only profit arises from the rates and duties. These are expressly exempted from the poor rates by the very terms of the act of parliament. It has then become an unproductive property, and is consequently not rateable. In the *Leeds and Liverpool* canal act (a) there is a special exemption of rates and duties, leaving the company liable to be rated to the extent of the value of the land. It is clear, therefore, that but for this special exemption the land would not be rateable. Where the legislature intend to exempt in this special manner they use precise words. If the argument on the other side were adopted it would be a virtual repeal of the act. The value here affixed by the sessions is a mere imaginary value. It is strange that although this navigation has existed since 1769, no attempt to rate it should ever have been made before.

(a) 5 East, 325.

LORD ELLENBOROUGH C. J. The circumstance of this property not having been rated for so long a period has considerable weight in inducing me to conclude that it is not rateable. The question is upon the construction of the particular terms used by the legislature in this act of parliament. The rates and duties are thereby exempted from the payment of any taxes, rates, assessments, or impositions whatsoever. In respect of what were these rates and duties then received? They were received in respect of the land, of the manual labour, and of the stowage of the vessels in which goods were transported. By estimating the value of these component parts you form cumulatively the value of the rates and duties. When the legislature, therefore, exempts those which are the aggregate, it must have intended to have exempted the component parts, of which the land (which is here rated) is one. In the *Leeds and Liverpool* canal act there was a special exemption. There the legislature made use of plain and unequivocal language: and if such had been found in this act they could not have been misunderstood, but there are no such words, and therefore it seems to me that the rates and duties being exempted, there is nothing left for which the company can be rateable, and that this order of session must be quashed.

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BAYLEY J. I own that I have felt great difficulty in the course of this argument, and even now my mind is not fully settled upon the point. The question arises upon the effect of this exemption. When the act passed, it was supposed that tolls were *eo nomine* rateable; that has indeed been since found to be inaccurate; but they were then considered to be rateable to the full extent of

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their value, and in the place where they were collected, which was productive of great injustice. The impression upon my mind was, that the legislature meant by this exemption only to prevent the company from being rated for the tolls *eo nomine*, and in the place where they were collected, but not to exempt them generally from the poor rate; and if that had been so, then the most convenient standard for estimating the rate would be the value of the land before it had been converted into a canal, which is the standard adopted by the sessions in this case. But inasmuch as the canal is for the public good, and not merely for the private benefit of individuals, it is possible the legislature may have intended to give this general exemption, and the construction derives considerable force from the special words of the exemption in the *Leeds* and *Liverpool* canal act. For it would not have been necessary to have introduced such words in that act, if without them the same construction would have obtained. It may be just that the property in this case should continue subject to the rate, but I incline to think, that for this purpose express words in the exemption are necessary.

ABBOTT J. I am also of opinion that the order of sessions should be quashed. It appears that the rates and duties form the only profit arising out of the land. These the legislature has expressly exempted from the payment of the poor rates and the only profit of the land being exempted, it would be a strong thing to say that the land itself should still continue subject to the rate. At the time of passing this act, tolls were considered *eo nomine* rateable; but I can find no instance

in which the tolls having been rated, the land has also been rated in respect of any other profit. The oldest case upon this subject is the case of the *King v. Wickham Market* (a): there the market-place was the thing rateable and the tolls were the measure of its value. The rate however in that case was imposed upon the tolls. In the *King v. Cardington* (b), the rate was also imposed upon the tolls, although the sluice where they were received was the property rateable; then if, as appears from these cases, by the word tolls may be meant the thing in respect of which the tolls are received, the exemption of tolls by the legislature must be considered as an exemption of that in respect of which they are receivable. That in this case is the land, and I therefore think that the land is exempted from the rate.

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HOLROYD J. I am of the same opinion. A rate on land is in effect a rate on the profits of the land, for where there are no profits, there is no beneficial occupation, now the rates and duties being exempted in this case, and there being no other profits of the land, I think the land itself must be considered as exempted.

Order of Sessions quashed.

(a) 3 *Kebble*, 540.

(b) *Cowp.* 581.

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Wednesday,
Jan. 28th.

The KING against The Inhabitants of
BRIGHTHELMSTONE.

Asoldier, whilst his regiment lay in barracks at B, took a house there for himself and family, of the yearly value of 10*l.*, and resided therein more than forty days: Held that this was a coming to settle in a tenement, and that he thereby gained a settlement.

TWO justices removed *William Lancaster* and his four children from *Gloucester* to *Brighthelmstone*. The pauper had been serjeant to one of the companies in the *South Gloucester* militia, which lay in barracks at *Brighthelmstone*, and performed all the duties, and received all the advantages incident to his situation as serjeant, and during that time had taken a tenement there of the value of 10*l.* a year or more, in which he had resided with his family for more than forty days. Upon appeal, the court of quarter sessions confirmed the order of removal, subject to the opinion of the Court of King's Bench, whether by such renting and residence the said *William Lancaster* gained a settlement in *Brighthelmstone* or not.

Nolan and *Twiss*, in support of the order of sessions, cited *Rex v. Hellingly (a)*, and contended that the party during the time he resided on this tenement, which was above forty days, was irremovable by the parish officer, and therefore gained a settlement by such residence.

The Court then called upon

Bolland and *Norton*, contra. This point was only adverted to in *Rex v. Hellingly*, but was not decided; and if this be held to be a settlement, it will

(a) 10 *East*, 41.

entail very heavy burthens upon those parishes in which, as in *Brightelmstone*, large bodies of troops are usually quartered. In *R. v. St. James*, in *Bury St Edmund's* (a), Lord *Ellenborough* held that a pauper detained by an accident in breaking his leg, could not be considered as a person coming to settle, he not having come into the parish *animo morandi*. So here the serjeant has no *animus morandi*, his movements being at the absolute disposal of the crown, who might order him away at a minute's notice. He cannot therefore be considered as coming to settle on a tenement, which the statute of 13 & 14 *Car. 2. c. 12.* absolutely requires. Besides, by the case it is stated, that the pauper received all the advantages incident to his situation as serjeant. Now lodging money is one of those advantages. This house therefore which he took with the lodging money is to be considered quasi a barrack, and his occupation an occupation by him on the part of the public. By the third section of the mutiny act, it appears that the legislature consider that a soldier during service has his power of acquiring a settlement suspended. For that clause makes his examination before the magistrates conclusive evidence of his last legal settlement. And accordingly it has been determined by this Court, that during that period, he cannot gain a settlement by hiring and service. Here he had not the absolute right of staying in the parish forty days. And though he stayed in fact longer, that makes no difference. For he might stay a year as a servant, and yet it has been ruled, that he would nevertheless gain no settlement by that.

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(a) 10 *East*, 25.

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STONE.

Lord ELLENBOROUGH C. J. In this case, it seems to me, that the sessions have drawn the right conclusion. It is contended that the party here had no intention of coming to settle at *Brightelmstone*; that is not correct; certainly he had the intention of settling there, subject however to the power of those who directed his movements. The case states that he himself took the tenements as a lodging for himself and his family. Now suppose an action then to have been brought against him for non-payment of rent, he clearly could not set up as a defence, that he was not the tenant of the premises; then if he, as a tenant, occupied this house of the yearly value of 10*l.* and upwards, he was during his occupation irremovable, and that having continued for forty days, he has gained a settlement. But it is said that the mutiny act prevents a soldier from gaining a settlement; that act, however, contains no such express provision: the clause enabling every soldier to be examined as to his settlement, does not disqualify him from obtaining a new one. The case of hiring and service is quite distinguishable from this; that proceeds on the ground of a person's not being permitted to contract two relations inconsistent with each other. In order to gain a settlement by hiring and service, he must engage to serve at all events for a year; now a soldier has not the capacity to render such service; for an order from the war office may, at any time, intervene, and take him from his master's control. The case of taking a tenement is quite different; he does not there engage to reside in it for any definite period, and if he does actually reside for forty days it is sufficient. If not, it would equally follow, that supposing an estate to have devolved upon him

him by act of law, or that he had made a purchase to the amount of 30*l.*, still no settlement would be gained by him.

Order of Sessions confirmed.

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The KING
against
The Inhabitants of
BRIGHTON-
STOKE.

The KING against The Inhabitants of HINCKLEY. *Wednesday, Jan. 28th.*

THE pauper, *William Sansom*, and *Elizabeth* his wife, were removed by an order of justices from the liberties of *Monks Kirby*, in the county of *Warwick*, (which liberties have overseers appointed, and maintain their own poor separately from the other parts of the parish,) to the parish of *Hinckley*, in the county of *Leicester*. The sessions, on appeal, confirmed this order, subject to the opinion of the Court of King's Bench on the following case:

The pauper was bound apprentice by the churchwardens and overseers of the liberties of *Monks Kirby*, to *John Wright* of *Hinckley*, by a parish indenture, of the third of *August*, 1795, which stated that *J. B.* and *E. B.*, churchwardens of the liberties of *Monks Kirby*, in the county of *Warwick*, and *S. C.* and *J. T.*, overseers of the poor of the said liberties, *by and with the consent of the justices of the peace for the said county*, whose names were thereto subscribed, had placed *William Sansom*, aged eight years or thereabouts, a poor child of the said liberties, apprentice to *John Wright*, of the parish of *Hinckley*, in the county of *Leicester*, frame-work-knitter, with him to dwell and serve from thence until the apprentice should accomplish his full age of twenty-one years, according to the statute in that case made and provided. The indenture was duly executed by all the parties thereto, and in the margin

An indenture stated that the overseers and churchwardens of *M.*, in the county of *Warwick*, with the consent of justices of the said county, bound a pauper apprentice to *T. W.*, of *H.*, in the county of *Leicester*, and the justices in their written consent in the margin described themselves as justices of the county *aforesaid*: Held that it sufficiently appeared that they were justices of the county of *Warwick*.

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The KING
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margin the magistrates stated their consent, but described themselves as justices *for the county aforesaid*. The pauper served his master under this indenture in the parish of *Hinckley* from the date of the indenture until its expiration, and during the whole of that period slept in that parish. The magistrates who signed the allowance of the indenture were magistrates for the county of *Warwick*, and also for the county of *Leicester*.

Reynolds and *Holbeck*, in support of the order of sessions, stated that the question was, whether the indenture had been improperly allowed by the magistrates. In order that it be so allowed, it must appear that they were justices of the county of *Warwick*; and they contended, that this sufficiently appeared on the face of the instrument; for it states, that the churchwarden of *Monks Kirby*, in the county of *Warwick*, by the consent of the justices of the peace for the said county, bound the pauper; then the allowance of the magistrates, stating them to be justices of the county aforesaid, must refer to the same county, which is *Warwick*.

Gurney, *Reader*, and *Adams*, contra, contended that in this case it was uncertain to which of the counties the justices belonged; for in the body of the indenture two counties are named, viz. *Leicester* and *Warwick*: the word "aforesaid" therefore may refer to either; and they relied upon the cases of *Rex v. Stepney* (a), and *Rex v. Chilverscoton*. (b)

LORD ELLENBOROUGH C. J. It is quite clear that the words "county aforesaid" can only refer to the

(a) 2 B.M. 638.

(b) 3 T.R. 178.

county

county of *Warwick*. The justices, we must presume, read the indenture before they allowed it; and indeed their very words of reference prove that it must have been so: then if they did read it, they must have known that they had no authority to act, except as justices of the county of *Warwick*. The question after all really is, whether *said* county and county *aforesaid* mean the same thing. If they do, it is evident from the body of the instrument that the words “said county” can only apply to the county of *Warwick*. It will follow, that the words “county aforesaid” must have the same application.

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The KING
against
The Inhabitants of
HINCKLEY.

Order of Sessions confirmed.

The KING *against* The Inhabitants of EARL SHILTON, in the County of LEICESTER. *Wednesday, Jan. 28th.*

UPON an appeal against an order of two justices for the removal of *John Armston*, his wife, and child, from the parish or township of *Stoney Stanton*, in the county of *Leicester*, to the parish or township of *Earl Shilton* in the same county. The sessions confirmed the order subject to the opinion of this Court on the following case:

By indenture dated the 10th day of *June*, 1799, *John Pratt* churchwarden, and *Daniel Morton* overseer of the poor of the parish of *Croft*, in the county of *Leicester*, with the consent of two magistrates, bound the pauper *John Armston*, being then about ten years of age, apprentice to *Enoch Gilliver* of *Earl Shilton*, in the county of

The statute 43 *Eliz. c. 2.* does not require absolutely two churchwardens in every parish for the management of the poor; and therefore an indenture, binding out a poor apprentice, by one churchwarden, (where by custom there was but one,) and one overseer, was held to be good within the 5th section of that statute, which requires it to be executed

by the greater part of the churchwardens and overseers
Leicester,

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Leicester, to serve him until the pauper attained his age of twenty-one years. The pauper served *Gilliver* under this binding for two years and resided in *Earl Shilton*. The appellants objected to the indenture, that it was signed by one churchwarden and *one overseer* only, and they then proved the registry of appointments of churchwardens for the parish of *Croft*, that in the year when the above indenture was executed only *one* churchwarden was appointed for that parish, and it was admitted that he was the only churchwarden of the parish, the year throughout. It was further proved that for forty years preceding, the practice had invariably been, in the above parish, to appoint only one churchwarden. The question, therefore, submitted to the consideration of the Court is, whether such indenture of apprenticeship made and executed during the time when the parish had but one churchwarden, is a valid instrument or not.

Beauclerk and *Marriott*, in support of the order of sessions. *The King v. Hinckley (a)*, is expressly in point with the present case. The indenture was there executed by one churchwarden and one overseer, and the Court held that that indenture was valid, on the ground that there might be two overseers and only one churchwarden, and then it was executed by the greater part. The Court here called upon

Scarlett, *Philipps*, and *Francklin*, contra. The validity of this indenture depends on the 43 *Eliz. c. 2. s. 5.*, by which the churchwardens and overseers, or the greater part of them, may bind out poor children. The statute therefore constitutes a particular body of persons

(a) 12 *East*, 361.

to whom it entrusts these powers, and it being a trust, the words of the act must be taken strictly. Now the question is, of how many persons must this body consist? The statute is precise as to the number of overseers: they must not exceed four, nor be less than two: and although the churchwardens are not so expressly limited in point of number, still from the word *churchwardens* being used there must be more than one; so that the entire body must consist of at least two of each class. Lord *Ellenborough* C. J. and *Le Blanc* J. in *Rex v. All Saints, Derby* (a), seem to have considered this the proper construction of the statute, although that point was not there decided; then if so, inasmuch as there was in this parish only one churchwarden, there was there no legally constituted body; and this indenture, although executed by the majority of the existing body, is therefore void: for the legislature have not chosen to intrust this power in parishes to a body in which there are not at least two churchwardens. In the case of townships they have indeed otherwise provided by 54 G. 3. c. 107. s. 2. By that act indentures signed by the overseers and churchwarden or churchwardens, or the major part of them, are made valid: but the cautious insertion of both singular and plural number shews their opinion as to the construction, when the latter only is used. There being therefore in this parish only one churchwarden, the body contemplated by the 43 *Eliz. c. 2. s. 5.* did not exist, and this indenture was void.

LORD ELLENBOROUGH C. J. This case has been very forcibly put by Mr. *Philipps* upon the words of the statute, and he has argued that the power of bind-

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(a) 13 *East*, 150.

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ing out poor children is only given when there are two churchwardens. Generally speaking there are two; but I think that the legislature used the word churchwardens here in the plural number, not as requiring that there should be two, but as speaking of the whole body of officers of that description of whatever number that body be constituted. By custom there may be only one churchwarden in a parish, and if so, it is absolutely necessary that all the powers of the 43 *Eliz.* should be vested in him, or otherwise the act would be nullified in all those parishes in which such a custom prevailed. The act does not expressly require two churchwardens, and the inconvenience that would necessarily result from adopting that construction of the statute is sufficient to induce me to reject it altogether.

BAYLEY J. I am of the same opinion. The word churchwardens in the plural number is here used because the legislature were aware that they were generally two. It is as if they had said, "all churchwardens, whether one or more." A custom to have only one churchwarden is valid, and such a custom must, therefore, have been abrogated by 43 *Eliz. c. 2.*, or else none of the provisions of that act could have been put in force. But there is no ground for supposing that that act of parliament had such an effect. There is no authority for saying that it is absolutely essential to have more than one churchwarden, and such a construction of the 43 *Eliz.* would be most unreasonable.

ABBOTT J. I am of opinion that this is a valid binding. A power is given by the statute to the same body of churchwardens and overseers, not only to bind out poor children, but also to raise rates for the relief
of

of the poor; and if this indenture were bad, every rate made by a body similarly constituted would be void also unless the legislature should interfere. That would be so mischievous a conclusion, that it is not reasonable for the court to adopt it. The case states, that there has been only one churchwarden in this parish for forty years, and it is not stated that there ever were more, and it may therefore be collected from what does appear, and what does not appear, that this has been an immemorial custom; if so, there is no power now to alter it; and if the construction contended for be adopted, no rate for the relief of the poor in this parish can ever be made. I think, therefore, that where there has been by immemorial custom only one churchwarden, such churchwarden, together with the overseers, may form a body, the major part of whom may lawfully execute all the powers contained in the 43d *Eliz.*

HOLROYD J. I am of the same opinion. It appears to me that the stat. 43d *Elizabeth* did not mean to make any alteration in the body of the churchwardens previously existing in a parish, but to add to that body the overseers, and to give to the aggregate body certain powers. If from time immemorial there has been only one churchwarden, the act gives no authority to appoint more; and if so, on the construction now contended for, nothing could be done under the act. I think the legislature meant merely by general words to give a power to the body of churchwardens at large, without considering whether that body consisted of one or more.

Order of Sessions confirmed.

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A pauper, before the expiration of her apprenticeship, hired herself and served for a year, the four last months of which were after her indentures had expired, and then hired herself to the same person for another year, but served only ten months: Held that the first service (although without the knowledge or consent of the master) might be coupled with the service under the last contract, and that the pauper thereby gained a settlement.

The KING against The Inhabitants of DAWLISH.

UPON an appeal against an order of two justices by which *Ruth Hookway* was removed from the parish of *Clyst Honiton*, in the county of *Devon*, to the parish of *Dawlish* in the same county. The sessions confirmed the order, subject to the opinion of this Court on a case which stated in substance as follows:

The pauper by indenture dated *September 3. 1804*, was bound apprentice by the parish officers of *Broadhembury* to *Robert Percy* of that place till she should attain the age of twenty-one, whilst under this indenture she served *John Blackmore*, with *Percy's* express consent, for two years in the parish of *Dawlish*, after which in *May, 1812*, she hired herself as a yearly servant to *Mrs. Bryant* of the parish of *Clyst Honiton* for 4l. a year. In the *September* following the indentures expired. At the end of her year, the pauper again hired for another year to *Mrs. Bryant*, and served ten months under this last hiring. There was no interruption between the two services. The first year's service with *Mrs. Bryant* was without the knowledge and consent of *Percy* the master.

Moore, in support of the order of sessions, contended that no settlement had been gained in *Clyst Honiton* by the hiring and service. The first hiring to *Mrs. Bryant* was in *May, 1812*, at which time the apprenticeship was still in existence, consequently no settlement could be gained under that contract, then after the expiration of the apprenticeship there is a fresh hiring under which

*See v. Harbury
B. & A. 6. 360*

which the pauper only served ten months, and though part of the first year's service was subsequent to the expiration of the indenture, that cannot be coupled with the service under the last hiring, because the first contract was made at a time when the party was incapable of contracting. A service under no contract may undoubtedly be coupled with a service under a yearly hiring; but this is a case distinguishable from that, for here the first service is under an unlawful contract.

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LORD ELLENBOROUGH C. J. If this were *res integra*, there might be some difficulty in admitting the principle that a service without a contract might be coupled with service under one, so as to gain a settlement; but that having been decided, this case ranges itself under the same class. Here, after *September*, 1812, when the incapacity ceased, the pauper became a regular servant to *Mrs. Bryant*. There is no interruption in that service, and she continued there above a year after that time: she therefore gained a settlement at *Clyst Honiton*.

BAYLEY J. concurred.

ABBOTT J. The first contract was either valid or void; if valid, then there is a good hiring and a good service; if void, then the first year's service will be a service under no contract at all, which, according to the argument, it is admitted may be coupled with the service under the second hiring. In either case the settlement is at *Clyst Honiton*.

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HOLROYD J. concurred.

Order of Sessions quashed.

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against
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DAWLISH.

Tancred was to have argued against the order of Sessions.

Thursday,
Jan. 28th.

The KING, on the Prosecution of JAMES HOWE,
against FRANCIS CRISP and Others.

The statute 18 Eliz. c. 5. which prohibits the compounding of any offence upon colour or pretence of process, or without process, upon colour of any offence against any penal law, does not apply to offences cognizable only before magistrates; and an indictment for compounding such an offence was holden bad in arrest of judgment.

INDICTMENT states, that one *James Howe* being a vender of coals, did use certain sacks, to wit, eleven sacks for carrying and delivering coals within such part of the county of *Surrey* as is situate within twenty-five miles of the *Royal Exchange*, which sacks did not respectively measure in the insides thereof four feet and two inches in length by two feet and one inch in breadth, and were respectively of less length and breadth, that is to say, two inches deficient in length, and one inch deficient in breadth, the said sacks measuring in the insides thereof respectively only four feet in length by two feet in breadth, contrary to the statute made in the 47 G. 3. intituled "an act for repealing the several acts for regulating the vending, and delivery of coals within the cities of *London* and *Westminster* and liberties thereof, and in parts of the counties of *Middlesex*, *Surrey*, *Kent*, and *Essex*, and for making better provision for the same;" whereby and by force of the statute, the said *James Howe*, forfeited and became liable to pay, for every of the said sacks so deficient in length and breadth as aforesaid, any sum not exceeding forty shillings nor less than twenty shillings. The indictment then

charged that defendants well knowing the premises, &c. without process did take and receive from the said *James Howe* a reward for their own use, (that is to say) forty Bank tokens of the value of 6*l.* and two Bank notes for the payment of 1*l.* each, and of the value of 2*l.*, and thereby did make composition with the said *James Howe*, for the said matter of offence so committed by him, which compounding was done without the order or consent of any of his Majesty's Courts at *Westminster*, and without any lawful authority whatsoever. In contempt, &c. against the form of the statute, &c. Plea, not guilty. At the trial before Lord *Ellenborough* C. J. at the last assizes for the county of *Surrey*, the defendant was convicted.

A rule was obtained in *Michaelmas* term by *Knowlys*, for arresting the judgment; on the ground that the offence committed by *Howe*, being cognizable only before a magistrate, the compounding of it by the defendant was not within the 18 *Eliz. c. 5.*, that statute being restricted to the compounding of offences cognizable before the superior courts.

Gurney and *Jessopp* now shewed cause. The words of the 4th section of the stat. *Eliz.* are sufficiently large to comprehend every species of offence which might be the subject of composition. By that section, "all persons offending in the making of composition, or who shall, by reason of any matter of offence against any penal law make any composition, or take any reward, shall be subject to the penalties thereby inflicted." At the time of passing this act, many such offences were determinable by justices of the peace; as for instance by the 11 *H. 7. c. 4.* the

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using of false weights and measures is made an offence cognizable by two magistrates, so also the 11 *H. 7. c. 15.* 33 *H. 8. c. 6.*, and 5 *Eliz. c. 15.* confer upon magistrates a summary jurisdiction, with respect to the several offences thereby respectively prohibited. The legislature therefore it is obvious might have had these summary jurisdictions in their contemplation at the time of passing the 18 *Eliz. c. 5.*, and *Pies case* (a) is an express authority to shew that that statute comprehends offences created by subsequent acts of parliament. The object of the legislature by that law, was to render the punishment of crimes more certain, and this will equally apply to offences cognizable before justices as to those which are cognizable before superior jurisdictions. The offence therefore charged in this indictment, is both within the words and the policy of the act. In the *King v. Southerton* (b) this court seemed to be of opinion, that such a case would fall within the statute, although the point was there not expressly decided.

Knowlys, contra. There is no instance of a proceeding under this statute for the compounding of any offence cognizable only before magistrates, and that of itself affords a strong argument to shew that such an offence does not fall within the statute. The 3d section prohibits an informer or plaintiff from compounding until after answer made in court unto the information in that behalf exhibited, nor after answer, but by leave of the court in which the suit shall be depending; the legislature therefore contemplated that the information or suit should be depending in some court, and where

(a) *Hutton's R.* 35.(b) 6 *East*, 140.

the word *courts* is used generally, it must be taken to mean the king's courts at *Westminster*. *Gregory's case*. (a) It could only be intended to comprehend in this statute offences there cognizable, and if that be so, this is not an offence comprehended within that statute. The words of the 4th section, however, are still stronger to shew that offences cognizable before the superior courts alone are within the meaning of the statute: the words of that section are, that "if any persons shall offend in making composition contrary to the statute, or shall by colour or pretence of process, or without process, by reason of any offence against a penal law, make any composition, or take any money, reward, &c. without consent of some of the courts at *Westminster*, that then," &c. That section clearly points to a case which might be the subject of process. In *Blackamore's case* (b) it is said, "that the term process is taken in law in two significations; in one largely, and in the other strictly; and in the larger sense it is taken for all the proceedings in all real and personal actions, and in all criminal and common pleas; and in the strictest sense for the proceedings after original upon the plea-roll before judgment." In neither of these senses can it apply to a proceeding before magistrates. Now as the offence of which *Howe* was guilty was one which subjected him only to a penalty recoverable before a single magistrate, it was not the subject of process; and the defendants, by making composition for it, have not offended against the provisions of 18 *Eliz. c. 5*.

LORD ELLENBOROUGH C. J. It seems to me upon a view of this statute, which in its consequences is most

(a) 6 *Rep.* 20.(b) 8 *Rep.* 313.

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penal, that the judgment must be arrested. There is no instance of an application to this Court, or to a single Judge, for leave to compound in a case where the proceeding originally commenced before a magistrate: at least I never knew of its having been made. The three first sections apply emphatically, and the fourth by fair intendment to proceedings before the superior courts at *Westminster*. The third section prohibits the informer from compounding "but by the order or consent of the Court in which the information or suit is depending," and the fourth section punishes "any persons who shall by colour or pretence of process, or without process, upon colour or pretence of any matter of offence against any penal law, make any composition, or take any money, &c. without order or consent of some of his majesty's courts at *Westminster*." Now the order or consent of the Court, must be of that court out of which the process has issued, and the words colour or pretence of process, must relate to a case where process might issue and be depending. In the present case, however, there can be no process depending: for the word process has a definite meaning annexed to it, and does not apply to cases cognizable only before a magistrate. The word *composition*, used in the fourth section, must also mean such composition as might be lawfully made by the consent of the superior court, in which process might then be depending. There is not any instance of a proceeding founded upon the statute for compounding an offence cognizable only before a justice of the peace; and that, considering the length of time that has elapsed, is a strong corroborative argument to shew that such a case does not fall within its meaning. In *Rex v. Southerton* there

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are expressions used obiter by some of the Judges which would seem to countenance the present form of indictment. But the attention of the Court in that case was not particularly directed to this point. Upon the whole, I am of opinion that all the four sections relate to offences cognizable before the superior Courts, and not to those cognizable only before a single magistrate.

HAYLEY J. I think that the true construction of this statute is to restrain the operation of the fourth section to cases cognizable in the superior courts. It appears, from the instances mentioned in the argument, that this summary jurisdiction of magistrates existed at the time of passing the act. If it had been intended to comprehend within the act the compounding of offences cognizable only before this jurisdiction, I think the legislature would have used express words for that purpose. The words they have used seem to me to apply to the superior courts: a case, however, where the magistrate and the superior courts had a concurrent jurisdiction would be within the act. The exception in the fourth section "of the clerks of *the courts*" evidently alludes to the courts mentioned in the other sections, which are the superior courts. Then follow the words "colour or pretence of process:" that must mean colour or pretence of writs of the superior courts; and the words "without process upon colour or pretence of any matter or offence against any penal law," apply to cases where the party might have the option of proceeding before the superior Court. I am, therefore, of opinion that this case does not fall within the meaning of the fourth

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section of the act of parliament; and consequently that the judgment must be arrested.

ABBOTT J. I am also of opinion, that the fourth section of this statute does not apply to a case prosecutable only before a justice of the peace. The first section, which speaks of the informer's exhibiting his suit in person, and pursuing it by himself or attorney in court, evidently does not apply to cases cognizable before magistrates only. The second section in terms applies to the courts at *Westminster*. The third to courts generally; and for the purpose of this case it is not necessary to say whether it applies to the courts at *Westminster* alone or not. It is sufficient that it must apply to some court. Then comes the fourth section, which is supposed to sanction this indictment. The words at the commencement, "If any person," &c. are general, but the words which follow qualify them: for colour or pretence of process apply only to proceedings in courts, and not before magistrates. Then the section goes on to state, that composition is not to be made without order or consent of the courts at *Westminster*. Now it would be so extraordinary to say, that these courts were to be applied to for their consent to compound cases before magistrates, that unless the plain and unequivocal words of the statute required it, I cannot think that such is the true construction of the act.

HOLROYD J. I am of the same opinion. I think it by no means improbable, that when the legislature passed this act, by which penalties so severe were imposed, they should choose to confine its operation to courts, and not to extend it to cases cognizable only be-

fore magistrates. It is clear from the words of the third section, which speaks of informers or plaintiffs, that only suits in courts were there contemplated. The fourth section in its commencement extends to all persons, but afterwards is confined to cases where the order or consent of the courts at *Westminster* may be given: and the words "colour or-pretence of process," and "without process," shew that the cases comprehended in this section must be those where process could be issued. We cannot therefore extend the act beyond the intention of the legislature, or construe it so as to include offences cognizable only before magistrates in their summary jurisdiction.

Rule absolute for arresting the judgment.

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The KING *against* The Company of Proprietors
of the GRAND JUNCTION Canal.

Saturday,
Jan. 31st.

THE Company of Proprietors of the *Grand Junction Canal*, appealed to the general quarter sessions of the peace for the county of *Hertford*, against a rate made on the 6th of *June* last, for the relief of the poor of the parish of *Hemel Hempstead*. The court of quarter sessions confirmed the rate subject to the opinion of the Court of King's Bench, on the following case.

The company are by the said rate, rated "for their canal" at the sum of 125*ol*. The canal occupies eleven acres and a half of land, extending two miles

A canal act directed that the company should be rated for all lands and buildings in the same proportion as other lands and buildings lying near the same, and as the same would be rateable if they were the property of individuals in their natural capacity; and a

subsequent act directed that all rates and assessments upon the personal estate of the company should be assessed in every parish in proportion to the length of the canal in such parish; Held that the company were liable to be rated for their lands, &c. only at the same value as other adjacent lands, and not according to the improved value derived from the land being used for the purposes of the canal. *5 Ad. C. 475.*

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and a half in length in the said parish. The annual value of the land lying near the canal in the said parish, is 2*l.* per acre. This case depends on the construction of statute 34 G. 3. c. 24. s. 19. and 36 G. 3. c. 25. s. 7. The question for the opinion of the Court of King's Bench is, whether the land used for the canal is to be assessed at the same rate as the adjacent lands, or whether the profits derived from the tolls are to be included in its rateable value. If the Court of King's Bench are of opinion that the land so used is to be assessed at the same rate as the adjacent lands, then the rate is to be amended by inserting the sum of 22*l.* 10*s.* instead of 1250*l.* otherwise the rate to stand. The following were the sections of the acts of parliament referred to in the case. 34 G. 3. c. 24. s. 19., and be it further enacted, that the said company of proprietors shall from time to time be rated to all parliamentary and parochial taxes and assessments, for, and in respect of the lands and grounds already purchased or taken, or to be purchased or taken, and all warehouses or other buildings to be erected by the said company of proprietors in pursuance of the said recited act and this act, in the proportion as other lands, grounds, and buildings, lying near the same, are or shall be rated, and as the same lands, grounds, and buildings, so purchased or taken, or to be purchased or taken and erected, would be rateable in case the same were the property of individuals in their natural capacity. 36 G. 3. c. 25. s. 7. And be it further enacted, that all parochial rates and assessments, which shall or may at any time be laid, assessed, or imposed upon the rates and personal estate of the said company of proprietors, shall be laid, assessed, or imposed, in each parish, township, hamlet,

or

or place respectively, in proportion to the length of the said canal and cuts respectively in such respective parish, township, hamlet, or place, and not otherwise.

Gurney, D. Pollock, and Trollope in support of the order of sessions. This question depends on the construction which the Court shall think right to give to 34 G. 3. c. 24. s. 19. and 36 G. 3. c. 25. s. 7. And this case is mainly distinguishable from *Rex v. St. Mary's Leicester*. (a) The words of the clause there, on which the Court relied were, "that in respect of the lands to be purchased for the use of the undertaking, the proprietors shall pay all parochial rates proportionably with other lands in the parishes where the same shall be situate, the same to be considered *as land* after the same shall be cut, and to be estimated according to the mean value of the lands lying on each side thereof." So that it appears the very words of the act there directed, that the canal should be considered as land, and being land that its value should be estimated in the particular mode there prescribed. But here the words are very different. The company by 34 G. 3. c. 24. s. 19. are to be rated for their lands, &c. *in the same proportion* as other lands, &c. lying near the same would be rated, and as the same would be rateable in case they were the property of individuals in their natural capacity. This does not fix the mode of valuing them. It does not say they are to be considered as land and estimated in a particular mode. Let us suppose those other lands in the parish were rated at two-thirds or three-fourths of the rack rent, and that two shillings or three shillings in the pound were collected from them, then if the lands, &c. in the possession of the

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company were rated in like manner, and similar sums collected from them, that would fulfil the former part of the clause perfectly well. And the latter part of the same clause which says, that the lands shall be rateable in same manner as they would be in case they were the property of individuals in their natural capacity, can only be complied with by rating the company at the improved value. Land when in the hands of individuals, is always rated according to its improved value. And the improved value of the land here is the value of the tolls. So that on 34 G. 3. c. 24. s. 19. alone, a strong argument may be raised. But granting that a doubt may arise on this act taken by itself; that is removed by 36 G. 3. c. 25. s. 7. That clause directs the rates to be levied in proportion to the length of the canal in each respective parish. Now this must have reference to the tolls. Formerly the tolls were rated wholly where they were received. The object of this clause was to distribute them rateably over the whole line of the canal. The act it is to be observed passed before the decision of *R. v. Nicholson* (a), which determined that tolls were not rateable *ex nomine*. The case must be considered as if these two clauses had been consolidated and formed but one enactment. Then it would be plain that the legislature contemplated the making these tolls subservient to the poor's rate. And the practice since the act has been consistent with this. For the company have uniformly submitted to the payment up to the present time.

Lord ELLENBOROUGH C. J. It is not necessary to hear the other side. It appears to me that the two

(a) 12 East.

acts were made for distinct purposes. The first act directs, that the company shall be rated for and in respect of their lands in the same proportion as other lands near the same, and as the same would be rateable in case they were the property of individuals in their natural capacity, by which I understand that they are to be rated as other lands would be supposing them not to be applied to the purposes of the canal, but to have remained in the hands of individual farmers for the ordinary purposes of agriculture, and not possessing any artificial value. Then comes the second act, which provides how the company are to be rated in the different parishes through which their canal runs. By the 7th section, all rates are to be levied in proportion to the length of the canal in each parish. That act therefore only directs and regulates the division between the parishes. Construing therefore the 34 G. 3. c. 24. s. 19. by itself, it is perfectly intelligible, and directs the land to be rated according to its natural and not its artificial value. The 36 G. 3. c. 25. s. 7. merely regulates the proportions of the rates where there are more parishes than one. In this view of the two acts they are not contradictory to each other, and the plain and obvious conclusion from them both is, that the company are not liable to the present rate.

BAYLEY J. The company in this case, are only rateable under 43 *Eliz.* as occupiers of lands, tenements, and hereditaments. The first act prescribes a plain mode of rating; it imposes a rate not according to the improved value of the land created by the tolls, but according to its value when first taken for the purposes of the canal. If this were not so, there are words in this act which could not have found a place there. The lands are

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to be rated as other lands lying *near* the same, not in the same parish but near; so as to give the mean value of the adjacent lands. It has been argued, that the legislature only meant to regulate the proportion in which the canal was to be rated to the other lands adjacent, as for instance, that if those lands were charged at three-fourths of their rack rent, then the canal also was to be three-fourths of its value, and so on in any other case. Now it would have been quite useless to have introduced a special provision to that effect; for in all cases that mode must be adopted. The legislature therefore could not have had that meaning in framing the clause. It does not, however, stop there, but directs that the land is to be rated as it would be if the property of individuals in their natural capacity. That is to be construed thus, that the land is to be rated as if it had never been appropriated to the canal, but had remained unappropriated in the hands of individuals. In that case there would be no improved value arising from the tolls. The second act only apportions the rate between the different parishes, and does not vary the extent of the company's liability. On the whole therefore, I am clearly of opinion, that this rate cannot be supported to the extent claimed, but that it must be amended by reducing it to the smaller sum stated in the case.

ABBOTT J. I am also of opinion that this rate ought not to stand, but that it should be amended by inserting the sum of 2*l.* 1*0s.* This case arises out of a rate imposed in terms upon the canal; for the company as is stated in the case are rated for their canal. This question has been argued upon the construction of the

34 G. 3. c. 25. s. 19. the language of which is perhaps not free from ambiguity, and which is somewhat further obscured by the subsequent act of 36 G. 3. c. 25. s. 7. I am of opinion that the true construction is that which has already been adopted by the Court, and the reasons for which have been so clearly given by my Brother *Bayley*. I may, however, in addition to what has already fallen from the Court, be permitted to observe on some circumstances which are in favour of that construction. By the act the company have a power of taking land for reservoirs: now in that state the land is wholly unproductive. If the company, notwithstanding that, are rated for it as land, there seems good reason for the legislature to exempt them from paying to the full extent of the tolls on the other parts of the canal; for otherwise there would be this injustice done to them, that where there was no profit there they should still be rated, and where there was considerable profit there should be no diminution of their burthen. But secondly, this was a scheme which might be wholly unproductive. We have all seen, in passing through the country, many instances in which similar undertakings have failed, either from want of water or from a change in the circumstances of the country through which the proposed line of canal was to have passed, and the legislature, therefore, might not think it improper to insert a clause in a canal act, the effect of which would be, that if the canal were not perfected, still the parishes should not be deprived of the benefit of the land which before that time paid rates to the poor, and that if the canal were perfected, then the company should be rated for it as land, at the rate at which the land was estimated before, when it was only subject to tillage. It is said,

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however, that the 36 G. 3. authorizes a different construction, but it must be recollected that that act was introduced when it was supposed that tolls were liable to be rated *eo nomine*, and it might be the object of the company to be relieved from the mode of rating then adopted; they might mean to say that the rates on the tolls should be paid, if paid at all, not alone in the parish where they were collected, but rateably throughout the whole length of the canal. But I think that this act left wholly untouched the question as to the quantum of the rate. There is another objection to the rate as it at present stands; this is a rate on the canal, and not on the rates, duties, and personal estate of the company as provided by the act, and therefore is bad in point of form: it would however, be still open to the different parishes, to impose rates in that amended form. But I think, that if they did, still on the other grounds stated by the court it would not be possible for them ultimately to succeed. Upon the whole therefore, I am of opinion that neither of the acts referred to, have the effect of giving validity to the present rate.

Order of sessions amended by reducing
the rate from 125*ol.* to 22*l.* 1*os.* (a)

Clarke, Copley Serjt., Espinasse, and Walford, were
to have argued against the order of sessions.

(a) *Holroyd J.* was absent in the Bail Court.

Butcher . . . Street 11 m. M. 1817 1818.

GOODMAN and Others *against* CHASE.

DECLARATION stated that in *Trinity* term, 1816, plaintiffs, as assignees of the estate of *William Hurst* and *Thomas Hurst*, by the judgment of this Court, recovered against *William Chase* the younger 686*L*. for their damages sustained by the breach of promises and for their costs; that on the 3d *July*, 1816, plaintiffs sued out a *ca. sa.* against *Wm. Chase* the younger, directed to the sheriff of *Hampshire*, upon which he arrested and had the said *Wm. Chase* the younger in custody on 12th *August*, 1816, and that in consideration that plaintiffs, at the request of defendant, would consent and agree that the sheriff should permit *Wm. Chase* the younger to go out of sheriff's custody, defendant undertook to put *Wm. Chase* the younger into the custody of the sheriff on or before *Saturday* then next, and in default of his doing so, that defendant would pay the costs and damages for which *Wm. Chase* the younger had been that day taken in execution; plaintiffs averred that they did consent that sheriff should permit the said *Wm. Chase* to go out of his custody, and that sheriff did accordingly permit him to go at large, yet defendant, not regarding, &c., did not put *Wm. Chase* the younger in the custody of the sheriff on or before the *Saturday* then next ensuing, or pay to plaintiffs the damages and costs for which *Wm. Chase* the younger had been taken in execution, and that *Wm. Chase* the younger had not at any time returned into the custody of the sheriff to plaintiffs' damage. Plea, general issue. The cause came on to be tried before *Abbott J.* at the

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Where a defendant, taken on a *ca. sa.* is discharged out of custody by consent of the plaintiff, the debt itself is extinguished; and, therefore, a promise by a third person to pay that debt, on condition of that discharge is an original promise, and not within the 29 *Ger. 2. c. 3.*

§ 4. *Quare*, Whether under the 29 *C. 2. c. 3. § 4.* in order to charge a person with the debt of another the consideration for the promise, as well as the promise itself, must be in writing?

See note 4 B. 5.

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Last assizes for *Hampshire*, when a verdict was taken for the plaintiffs for 686*l.*, subject to the opinion of the Court on the following case :

The plaintiffs having recovered the judgment (mentioned in the declaration) against *William Chase* the younger, sued out a ca. sa., under which he was arrested on the 12th *August*, 1816. On his arrest he applied to the plaintiff's attorney for time to get the money, and in the mean time to be released from custody; to which the plaintiff's attorney consented, provided defendant (the father of the said *Wm. Chase* the younger) would sign a written paper, which was delivered to *John Handley*, the sheriff's officer, to be taken to the defendant for that purpose. Immediately on receiving that paper, *Handley* having the said *Wm. Chase* the younger still in his custody, waited on the defendant, who knew him to be a sheriff's officer, and delivered the paper to the defendant, having first read it over to him in the presence of *Wm. Chase* the younger, and having at the same time informed the defendant that *Wm. Chase* the younger was in his custody, and that the plaintiff's attorney was ready to let the said *Wm. Chase* the younger out of his custody if the defendant would sign that paper; upon which the said defendant read the paper over, and signed it: the contents of the paper were as follow, viz. "I do hereby undertake and agree to put the above defendant into the custody of the sheriff of *Hampshire* on or before *Saturday* next, and in default of my doing so I undertake to pay the damages and costs for which the said defendant has been this day taken in execution by the said sheriff at the suit of the above-named plaintiffs." Dated, &c. The paper so signed was returned by *Handley* to the plaintiff's attorney, by whose consent

the said *Wm. Chase* the younger was thereupon discharged out of custody: he did not however return into the custody of the sheriff on or before the *Saturday* next after the date of the said written paper, nor hath the 686*l.*, nor any part thereof, been paid. The said *Wm. Chase* the younger did however on the 6th *November*, on which day the *ca. sa.* was returnable, offer the plaintiff's attorney to return into custody in discharge of the defendant's agreement, but the plaintiff's attorney refused to discharge the defendant from his agreement on those terms, and he on the same day offered to surrender himself to the under-sheriff, who refused to receive him.

This case was twice argued; first, in *Michaelmas* term, by *Moore* for the plaintiff, and *Minchin* for the defendant; and now in this term by *Gaselee* for the plaintiff, and *Bayly* for the defendant.

Moore in the first argument made two points; first, that it was not necessary that any consideration should appear on the face of the paper-writing in this case; secondly, that if it were necessary, it did sufficiently appear. On the first point he admitted that *Wain v. Warlters* (a) was a direct authority against him, but he contended that that decision ought to be overruled, and for this purpose he cited *Pillans v. Van Mierop* (b), *Morris v. Stacey* (c), *Ex parte Minett* (d), *Ex parte Gardom* (e), and *Lyon v. Lamb*. (f) The word agreement is not used in 29 *Car. 2. c. 3. s. 4.* in its accurate legal sense, but in a popular sense. [*Abbott J.* Suppose a pro-

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(a) 5 *East*, 10.(c) 1 *Holt N. P.* 153.(e) 15 *Ves.* 286.(b) 3 *Burr.* 1663.(d) 14 *Ves.* 190.(f) *Fell's Law of Merc. Guar.* 239.

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missory note in these words, "I hereby agree to pay the bearer 20*l*." would not that be a good negotiable security, and available in law?] As to the second point, the consideration does sufficiently appear here. For it appears from the agreement that *Chase junior* was then in custody, and the defendant agrees to return him into custody, or pay the debt. It follows, therefore, that he must in the interval be liberated, and that will be a sufficient consideration.

Minchin, contra, contended first, that the sheriff's officers, by carrying *Chase junior* to the defendant's house instead of taking him directly to prison, had permitted an escape. If so the debt was discharged, and the plaintiff had his remedy against the sheriff. Then there was no consideration at all for the defendant's promise, and in support of this he cited *Benton v. Sutton*. (a) [*Bayley J.* The plaintiffs' attorney went with them to the defendant's house. That would have been an answer to the action for the escape.] On the other point he relied on *Wain v. Warlters*. The cases cited from the Chancery reports merely contained dicta of the Lord Chancellor relative to that case, but were not decisions upon the point. He then cited *Barrell v. Truswell*. (b)

LORD ELLENBOROUGH C. J. It would be very desirable to have a fuller examination made into the decisions on the other side of the hall where these cases more frequently occur than here, in order that we may more clearly ascertain what the practice is there: the Court therefore orders a second argument.

(a) 1 *Bos. & Pull*, 24.(b) 4 *Tampt.* 121.

When the case was called on the second time, the Court said that it was unnecessary to hear *Gaselee* on the case of *Wain v. Warlters*, inasmuch as it appeared to them that the plaintiff, by agreeing to let *Chase* junior out of custody, had entirely discharged the debt as to him; and then the case would be, that the defendant promised to pay a certain sum of money, in consideration of the debt between the plaintiff and *Chase* junior being put an end to: which being a detriment to the plaintiff, would be a good consideration for an original promise, and take the question entirely out of the statute of frauds. They then called on the other side.

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Bayly, contrà, contended, first, that here there was a previous escape. The sheriff's officer, instead of taking *Chase* junior to prison, took him to the defendant's house, and this was with the consent of the plaintiff's attorney. The debt therefore was discharged before the promise of the defendant was made. There was then no consideration for it, *Benton v. Sutton* (a), *Ravenscroft v. Eyles* (b), *Com. Dig. tit. Escape. C.* [*Bayley J.* Does the case state that the sheriff's officer took *Chase* junior to any place where he ought not to have gone? It is even quite consistent with what appears there, that the defendant might have been in another room in the lock-up house, and the sheriff's officer have taken *Chase* junior into that room. Lord *Ellenborough C. J.* It does not appear that the sheriff's officer took *Chase* junior one inch out of his way to the prison.] Then as to the point suggested by the

(a) 1 Bos. & Pull. 24.

(b) 2 Will. 294.

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Court, this case is distinguishable from *Williams v. Leper*. (a) In that case *Aston J.* says, that the goods were the debtor; and that if the promise there had been to pay the debt of *Taylor*, it would have been within the statute. But here there are no goods or other funds liable, but *Chase junior* alone. The debt is not wholly at an end by the discharge, but is for some purposes considered as still subsisting in law. As where there are more defendants than one, the discharge of one would not prevent the other from being taken by a ca. sa. unless the debt had been satisfied. *Bro. Abr. Executions*(b), *Robinson v. Clayton*(c), *Crawley v. Lydgeat*(d), 1 *Roll. Abr.*(e) [*Abbott J.* Have you any instance of the effect produced on a co-defendant, where the party first taken on a ca. sa. is discharged by consent of the plaintiff? In the case of *Robinson v. Clayton*, the escape was not with the plaintiff's consent. The words in the 4th section of the statute of frauds have always been construed to mean, that the person for whose debt the collateral promise is made must still remain himself liable for the debt. But here *Chase junior* was discharged from the debt. *Bayley J.* It has been decided, that if there be a joint execution against two, and one of them be taken on a ca. sa., and he be discharged upon terms; then although he does not perform the conditions, still you cannot take the other afterwards in execution. If as in the case cited from *Cro. Car.* the party has wrongfully and without the plaintiff's assent withdrawn himself, the plaintiff's right may revive. But here the plaintiff by his consent to the discharge has released the whole debt,

(a) 3 *Burr.* 1887.(d) *Cro. Jac.* 338.(b) *Pl.* 8.(e) *P.* 896.(c) *Cro. Car.* 240.

and cannot afterwards proceed against *Chase junior*. *Holroyd J.* The cases of *Cohen v. Cunningham and Another (a)*, *Blackburn v. Stypart (b)*, and *Whitacres v. Hamkinson (c)*, are directly in point, and establish that the debt of *Chase junior* to the plaintiff was put an end to by the discharge in this case.]

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Lord ELLENBOROUGH C. J. By the discharge of *Chase junior* with the plaintiff's consent, the debt as between those two persons was satisfied. No case can be cited in which such a discharge has not been held quite sufficient. Then if so, the promise by the defendant here is not a collateral but an original promise, for which the consideration is the discharge of the debt as between the plaintiff and *Chase junior*. That being so, it becomes wholly unnecessary to consider the question arising out of the construction of the fourth section of the statute of frauds.

Judgment for the Plaintiff

(a) 8 T. R. 123.

(b) 2 East, 243.

(c) Cro. Car. 75.

HANSON *against* STEVENSON and MILLS, Assignees of LEDGER, a Bankrupt.

Tuesday,
Feb. 3d.

COVENANT for rent, &c. brought against defendants as assignees of a lease of premises (therein described) granted to *Henry Ledger* before his bankruptcy. Plea, 1st, non est factum; 2d, that all the estate, right, title, interest, term of years then to come, and un-

When the assignees of a bankrupt enter upon and take possession of his leasehold property, they become chargeable with the covenants in

the lease, although the bankrupt's effects were upon those premises, and the assignees delivered up the keys immediately after the effects were sold.

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expired property, claim, and demand, of the said *Henry Ledger*, of, in, and to the said demised premises with the appurtenances, by assignment thereof made, did not legally come to and vest in the defendants. Upon these pleas issues were joined, and the cause was tried before Lord *Ellenborough* C. J. at the summer *Surrey* assizes, 1815, when a verdict was found for the plaintiff, subject to the opinion of the Court on the following case:

On the 21st *January*, 1813, plaintiff demised the premises mentioned in the declaration to *Ledger*, the bankrupt, for the term, and upon the covenants stated in the lease, and he took possession of the premises, and there carried on his business of a dyer and buckram stiffner. On the 29th *June*, 1814, a commission of bankruptcy issued against *Ledger*, and on the 19th *July*, the defendants were chosen his assignees, and the usual assignment was then made by the commissioners, and a counterpart of such assignment duly executed by the defendants as assignees. Before the bankruptcy *James Belcher* the bankrupt's foreman resided upon, and had the care of the premises and machinery. The defendants took possession of the premises as assignees, and the defendant *Stevenson* came upon them and gave directions. *Belcher* continued to reside there as before, and was employed, and during the latter part of the time paid by the assignees for his trouble. In *July* and *August* the lease, fixtures, and stock of drugs were repeatedly advertised for sale by private contract, with reference to defendant *Stevenson*, and the solicitors to the commission; and offers were made for the premises to the assignees, but rejected, and they continued to keep the premises. The lease was also put up to sale by public auction by defendants as assignees, on the

17th *November*, 1814, when there was no real bidder. On the 6th *March*, 1815, the lease, fixtures, and stock of drugs were advertised, and put up for sale by public auction by order of the defendants, to be sold upon the premises. At this sale the machinery, stock, and utensils were sold, but not the lease, the premises in the particulars of both sales were described as being put up to sale by order of the assigness, with liberty to view the same on applying to *Belcher* on the premises, and also with a reference for particulars to the solicitors under the commission, and to the auctioneers; and amongst other conditions of that sale, the lots were required to be cleared away in four days at the buyers' expence, who were to make good all tiling or other damage to the buildings, pavements, &c. that might be occasioned by the taking down or removal of the lots, and any persons suffering their lots to remain upon the premises after the 11th *March* were to be deemed trespassers. The plaintiff received half a year's rent (due at *Christmas*, 1814,) from the defendants, out of the bankrupt's effects. After the removal of the property, on the 27th of *March*, the keys were by order of defendants taken to the house of the plaintiff, and left there in his absence, but on his return home he refused to accept them and sent the defendants a written notice to that effect. At the time of bringing the action the quarter's rent, which became due at *Lady-day*, 1815, was in arrear. The question for the opinion of the Court was, whether the plaintiff was entitled to recover. If the Court should be of opinion that he was, the verdict was to stand, otherwise a nonsuit to be entered.

Larves for the plaintiff was stopped by the Court.

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Conyn for the defendant. The question in this case is, whether the defendants have ever so taken to these premises as to make themselves liable to the covenants in the lease: and although it be stated that they took possession, still that act must be taken conjointly with the other circumstances in the case. The effects of the bankrupt were upon the premises, and the assignees could not possess themselves of the one without the other. The act of putting up the bankrupt's interest in the lease to sale, is not of itself sufficient to make the assignees liable. *Turner v. Richardson*. (a) The assignees in this instance appear to have taken possession with the view alone of possessing themselves of the bankrupt's goods, and of ascertaining whether his interest in the lease were beneficial or not; and after the removal of the goods, and the lease had appeared to be unproductive, they returned the key of the premises to the plaintiff. In *Wheeler v. Bramah* (b) the assignees paid rent; and the bankruptcy there occurred in *March*, 1810: the bankrupt's effects were sold on the premises in *May*, 1811, and the lease then put up to sale, but not sold, and the assignees did not return the key of the premises till *September*; yet it was held that they were liable, although they even continued in possession of the premises for a year and a half, and near four months after the sale of the bankrupt's property; that case, therefore, was not so strong against the assignees as the present. In all the cases upon this subject the premises have for a time been withheld from the landlord, and the consequence of deciding that the defendants are liable in this instance will be, that assignees in

(a) 7 *East*, 335.(b) 3 *Campb.* 340.

future can in no case take possession of the bankrupt's effects upon leasehold premises, without subjecting themselves to the payment of rent.

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Lord ELLENBOROUGH C. J. The assignees of a bankrupt are not bound to take what Lord *Kenyon* called a *damnosa hæreditas*, viz. property of the bankrupt, which so far from being valuable would be a charge to the creditors; but they must make their election promptly, and having once made it, they must abide by that decision. There would be great danger, and it would shake the bankrupt laws, if after the assignees have once taken possession, they should afterwards be permitted to recede from their original purpose, because the property may not then appear to be so productive as they at first expected. Here it is stated as a fact that they have taken possession, and by that act unexplained they must be considered to have possessed themselves in virtue of the legal right conferred upon them by the assignment for the commissioners, viz. as assignees of the term, and then they have made themselves liable to the covenants in the lease. I know of no instance in which a deliberate act of taking possession has been curtailed of its full legal effect. If the assignees had wished so to curtail it, they should have entered upon the premises with a protest that their entry was not for the purpose of possessing themselves of the premises as assignees, but not having done so, they have subjected themselves to the payment of rent.

BAYLEY J. In the case of *Turner v. Richardson* the assignees never entered upon the premises: the question there was, whether the putting up of the lease to sale by auction

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auCTION was a taking possession ; the Court held that it was not so, it being a mode used by the assignees for ascertaining whether it was advisable for them to take possession or not. Here, however, they have occupied, and there is no act of parliament that says that the assignees of a bankrupt may occupy premises without paying rent.

ABBOTT J. I am of the same opinion. In the case of *Wheeler v. Bramah*, which has been cited, the assignees never took possession of the premises at all, although it was agreed between them and the landlord that the premises should be put up to sale, to see if they were worth any thing. The assignees there expressly stated to the landlord, that they would not take to the premises unless it turned out that the lease was beneficial. Here, however, it is stated in general and unqualified terms, that they entered and kept possession of the premises for three months, and that constitutes an essential difference between the two cases.

HOLROYD J. concurred.

Judgment for the Plaintiff.

Tuesday,
Feb. 3d.

ANDERSON *against* HAMPTON:

A bankrupt having escaped out of the custody of the marshal, and being at large, surrenders to a commission subsequently issued, and receives the protection conferred by 5 G. 2. c. 30. s. 5. : Held that he may, notwithstanding, be retaken and detained in custody by the marshal.

CAMPBELL, on a former day, had obtained a rule calling on the marshal to shew cause, why the defendant in this case should not be discharged out of

custody,

custody, and why the marshal should not pay the costs of the application. The defendant in his affidavit stated, that a commission of bankruptcy having issued against him, he duly surrendered to it on the 20th *January* last, and obtained from the commissioners the protection from arrest given by the 5 *G. 2. c. 30. s. 5.*, not being in custody at the time when he surrendered. That on the 23d *January*, he was taken into custody by one of the marshal's tipstuffs, and that being brought before the deputy-marshal, he was informed by him, that he was taken on an escape warrant, and that the marshal on being afterwards applied to for that purpose had refused to discharge him. The marshal in his affidavit stated, that the defendant was on 26th *March*, 1817, committed to his custody in execution at the suit of *G. M. Turner*, and *G. R. Turner*, for 247*l.* 10*s.*, and on mesne process at the suit of the plaintiff *Anderson*. That he remained in custody till he escaped, and that the escape was without the marshal's consent or connivance. That afterwards, on the 23d *January*, without any warrant of a judge or magistrate, but on his own authority as marshal alone, he apprehended him by one of his tipstuffs. And that defendant had not been discharged as to this action, nor the plaintiff's demand therein either wholly or in part satisfied.

Marryatt shewed cause. The defendant was not arrested on any escape warrant in this case; that would be at the suit of a creditor, and issued by a judge or a magistrate. But here the marshal apprehended him on his own authority, as a gaoler has a right to do where a prisoner has escaped. The act 5 *G. 2. c. 30.*

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s. 5. gives no privilege to a bankrupt against a recaption by a gaoler. That act only frees the bankrupt from all restraint, arrest, or imprisonment of his creditors, and the words "any escape warrant" must refer to escape warrants at the suit of creditors. But there is another answer to this application, for the act only gives the privilege where the party is not in custody at the time of his surrender; now here he was in custody at the time. He was not it is true actually in prison, but in contemplation of law a party who has escaped is considered still as in the custody of the gaoler, who may therefore take him wherever he finds him. In the case of bail, the person bailed is not in the actual, though certainly in the legal custody of his bail. This point was expressly determined by Lord Eldon, assisted by Mr. Justice Le Blanc, in the case *Ex parte Johnson*. (a)

Campbell, contra, contended that the words of the 5 G. 2. c. 30. s. 5. were quite general, "any escape warrant," and were not confined to escape warrants at the suit of creditors only. And it is not denied here, that the deputy-marshal informed the defendant that he was taken on an escape warrant. As to the words "provided such bankrupt was not in custody at the time," they must mean an actual custody, which did not exist here. In the case *Ex parte Johnson*, the privilege was resisted on a different ground. There the forty-two days for surrendering had expired, and the principal question was, whether the bankrupt, having received a pardon, and obtained an order from the Chancellor, giving him liberty to surrender and

(a) 14 Ves. 36.

pass his examination, was in the same situation, and entitled to the same protection as if he had originally surrendered within the forty-two days. But here the defendant surrendered to his commission in due time.

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LORD ELLENBOROUGH C. J. The freedom from arrests spoken of in the act of parliament is a freedom from arrests at the suit of the creditors. It cannot therefore extend to a case like this. Here the party who has escaped is still in point of law, and for the benefit of the gaoler, considered to be in custody. The words "any escape warrant" do not touch the present case. The escape warrant is a remedy which the creditor may make use of, but the marshal does not want it, for he has a right of his own authority, and on fresh pursuit, to take a prisoner who has escaped wherever he can find him. The rule must therefore be discharged.

BAYLEY J. It would be a great injustice to the gaoler, if you were thus to deprive him of the benefit of a fresh pursuit. The case of bail clearly shews that a person not in actual custody may still be so in contemplation of law. If the defendant here had been in custody when he surrendered, it is admitted that he would not be entitled to this privilege. And I think that though he was actually at large at that time, still he must for all legal purposes be considered as having then been in the custody of the marshal.

ABBOTT and HOLROYD Js. concurring,

The Rule was discharged with Costs.

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Wednesday,
Feb. 4th.

The KING against HOULDGRAVE.

The sessions are not authorized to order the payment by the bridge-master to the clerk of the peace of a per centage on all money raised for the repair of bridges in a particular district, in lieu of all his fees for indictments, presentments, &c. for bridges within it; although such per centage was claimed as an ancient fee, and had been paid without dispute for a long period of time.

AT the *Lancashire* quarter sessions of the peace, holden at *Wigan* on the 20th of *January*, 1817, the Court made the following order: "The deputy-clerk of the peace having stated to this Court that Mr. *James Houldgrave*, the bridge-master of the hundred of *West Derby* in the said county, hath withheld and refused to pay him the ancient and accustomed fee of one shilling in the pound upon the money raised for the repairs of bridges in the said hundred during the last year, and which fee is in lieu of all court and other fees due to him upon all business relating to the indictments and presentments against the said hundred for not repairing bridges and roads; and this Court having heard the claim and objections thereto, this Court doth order the said bridge-master forthwith to pay the amount of such fees to the deputy-clerk of the peace; for doing which this shall be the said bridge-master's authority." This order having been removed by certiorari into this court, a rule was obtained to shew cause why it should not be quashed. It appeared from the affidavits on both sides, that this fee had been received for a long period of years; and, by the present claimant, ever since the year 1789, without any dispute. Its origin could not be discovered; but it was found enumerated, amongst others, in an ancient parchment writing, purporting to be a table of fees in the office of the clerk of the peace; in which was this entry: "*Rolls, 13s. 4d. each: except for hundred bridges in Leyland and Derby, who pay 12d. per pound.*" The mode of collecting the money

money for the repairing of bridges, &c. was, by issuing these rolls or assessments to the high constables of the different hundreds, who having collected them by means of the petty constables in the proper proportions, paid the amount over to the county treasurer, after deducting in these two particular hundreds this poundage claimed by the clerk of the peace. Since 55 G. 3. c. 51. another regulation had been adopted, by which the high constables, having first collected the money from the overseers of the poor instead of the petty constables, paid over the whole sum to the bridge-master, without making the deduction before-mentioned: and therefore the claim of the clerk of the peace was now made upon the bridge-master. Since the date of the order it appeared that the bridge-master, in compliance with it, had paid over the sum claimed to the clerk of the peace.

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Scarlett and *J. Williams* now shewed cause. The question here is as to the jurisdiction which the magistrates at sessions had to make this order. If it be not a good order under the 12 G. 2. c. 29. it cannot be sustained. If the bridge-master has money in his hands, received by him under that act, and the justices had authority to make this order, then the case is clearly made out. Now, that he had money in his hands is quite apparent; for it is stated by the affidavits that he has, in compliance with the order, paid it over to the deputy-clerk of the peace. Then as to the form of the order. It directs the bridge-master to pay the money absolutely, and not out of such funds as may be in his hands. But this is not of any importance. If indeed he had no money in his hands, it would be a defence

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to him, in case any proceedings were adopted against him for not obeying the order; but it is not necessary in a case like this to begin with a formal recital, "Whereas you have in your hands certain funds," &c. to make this a valid order. This very form was adopted in *The King v. The Inhabitants of Essex*.^(a) There there was not any recital of any funds being in the treasurer's hands, but only a simple order for him to pay a certain sum to the clerk of the peace. [Lord *Ellenborough* C. J. The question as to the form of the order was not adverted to in that case. Besides this is an order, not on the treasurer, but on the bridge-master. Is there any statute which speaks of the latter as a subsisting officer, having funds in his hands? Unless that be so, and he be necessarily presumed to be full-handed, the justices must, in the order, direct him to pay out of the funds in his hands. *Bayley* J. Is there any statute which makes the bridge-master the treasurer of a fund for the repair of bridges.] Before the 55 G. 3. c. 51. the bridge-master had no funds in his hands, except for the purpose of paying the workmen employed under him, but since that act, the custom of raising the money for these purposes is altered. Now, the money is paid over by the high constables (who collect it) directly to the bridge-master, instead of being paid first to the county treasurer, and then issued by him to the bridge-master. So that now, it may be said, the bridge-master is the treasurer for the bridges, and he may be presumed to have money in his hands, as the county treasurer, it may be supposed, was in *Rex v. The Inhabit-*

(a) 4 T. R. 591.

ants of Essex (a). And though there the form of the order was not expressly adverted to, it could hardly have escaped the attention of the Court if it had been a fatal objection. And the act 55 G. 3. c. 143. s. 5. seems also to recognize expressly a fund in the bridge-master's hands, for it authorizes the payment of contracts out of it. Then the only remaining question is, whether the justices had power to make an order to this effect. The sum claimed by the clerk of the peace is in lieu of all fees on indictments, presentments, traverses, &c., which would be payable by the inhabitants of these two particular hundreds. The order made, is for work done in the preceding year. It does not appear to be an unreasonable compensation, and this Court will not take upon itself to tax the bill of the clerk of the peace for that period. Every intendment is to be made in favour of such an order. It may be presumed that the sessions, on due investigation, determined that this was a fair remuneration for the trouble of their officer in the preceding year. If so, then this order would be good. In *The King v. The Inhabitants of Essex* a gross sum of 150*l.* was ordered to be paid, and this Court then would not go into the question whether the quantum ordered there was reasonable or not. It may be said, that the sessions here should have ordered the bill of the clerk of the peace to be paid, and not have given such a compensation as this. But that observation would equally have applied to the case above cited. There Lord *Kenyon* relied upon the thing being warranted by precedent and long usage. Those exist here; for the antiquity of this payment is not, and cannot be, disputed.

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(a) 4 T. R. 591.

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Richardson, on the other side, was stopped by the Court.

LORD ELLENBOROUGH C. J. I accede fully to the doctrine laid down by Lord *Kenyon* in the case cited, that wherever a duty is imposed on a county, and where costs incidentally and necessarily arise in questioning the propriety of acts done to enforce that duty, the magistrates, who have the superintendence over the county purse, have necessarily a right to defray such expenses out of the county stock. It is therefore quite clear, that in this case the magistrates had a jurisdiction over the subject-matter. They had a full right to order these expenses to be defrayed out of the county stock. But the question is, whether they had a right to make that order in these terms. It is not necessary for us to say, whether the order is bad in point of form, as being on the bridge-master, and directing him to pay this money absolutely, and not out of such funds as may at the time be in his hands; for I think it cannot be supported on another ground. The magistrates had no authority to make an accumulated compensation of this nature to the clerk of the peace. Their duty was, at the end of each year, to ascertain how much business had been done by him, and what sum was due for it. But here they have, instead of taking the items of his bill division, substituted a sort of average computation. They have, in this order, directed the bridge-master to pay an ancient and accustomed fee of one shilling in the pound on all the money raised, in lieu of all the fees due to him, upon all business relating to the indictments and presentments for not repairing bridges and roads in this hundred. Now how can that be for a moment considered

dered as an award by them to him of a fair compensation for his trouble? It does not depend on his trouble; and is not more or less in proportion to it. Then this Court, seeing that the magistrates have here adopted an improper and illegal rule for computing the amount of this compensation, can do no otherwise than quash this order, which is founded on that computation.

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BAYLEY J. The rule which it was proper for the magistrates to have adopted was this; that the clerk of the peace should be paid according to the quantum of trouble which he had had. But they cannot order a gross sum to be paid to him without reference to that. They might as well have attempted to give a fixed salary to their attorney instead of paying him according to the business which he had done. They have here stated their mode of calculation on the face of the order; and the court see that it has no reference to the quantum of business done. Then they have adopted a rule which is illegal, and cannot be supported. Before 55 G. 3. c. 143. the magistrates could not order repairs beyond the amount of 20*l.* (a) to be done to any county or hundred bridge without a previous indictment or presentment. Since that statute, they may without indictment, order repairs to any extent. So that the labour of the clerk of the peace, for which this is called a compensation, is now greatly abridged; but the compensation still remains the same. This clearly shews, that this has none of the features of a compensation, inasmuch as it does not vary, as the business itself varies. But unless it be a compensation,

(a) See 52 G. 3. c. 110. s. 1.

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it cannot be supported. This order therefore must be quashed.

ABBOTT J. I am of the same opinion. The court of quarter sessions had no right to order a substituted sum to be paid in lieu of a compensation for the business done by the clerk of the peace. Perhaps it might have been contended, that if the magistrates had ordered a gross sum to be paid as a compensation, their order might, on the authority of the case cited in the argument, have been supported. But here they have done no such thing. They have ordered a payment of five per cent. on all the money raised for the repair of bridges within a particular district. Then they have adopted a rule of computation which this Court think cannot be proper. Even supposing that, before the power of raising money without previous presentment or indictment was given, this was a reasonable compensation, still, after that period, it cannot continue to be so, the business having diminished. Then, if unreasonable now, it ought not to remain. The order of the magistrates in this case is therefore bad, and cannot be supported.

HOLROYD J. concurred.

Rule absolute for quashing
the order of sessions.

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The KING *against* The Inhabitants of FIL-
LONGLEY.

Wednesday,
Feb. 4th.

UPON an appeal against an order of two justices, by which *William Downes*, his wife and child, were removed from the parish of *Coleshill* in the county of *Warwick*, to *Fillongley* in the same county, the Sessions confirmed the order, subject to the opinion of the Court on the following case:

A service under a hiring for 51 weeks may be coupled with a service under a previous hiring for a year, so as to confer a settlement.

The pauper being settled in the parish of *Fillongley* previous to *Old Michaelmas* in the year 1812, was hired by one *Wm. Hollick* of the parish of *Ansley* in the county aforesaid, from the then next *Old Michaelmas*, for a year, at 7*l.* 10*s.* wages: at the same time the said *Wm. Hollick* said to the pauper, that he did not know the custom of the parish as to hiring for a year, or fifty-one weeks; that he would inquire, but he believed it must be for a year, and hired him for a year. The pauper entered into the service in pursuance of this contract; three or four days after which *Wm. Hollick* (having previously to the pauper coming into his service ascertained that the practice of the parish was to hire for fifty-one weeks) asked the pauper whether he would consent to the hiring being for fifty-one weeks, to which the pauper consented. He continued in *Mr. Hollick's* service until a week before *Old Michaelmas* in the next year, when the said *Wm. Hollick* paid him the 7*l.* 10*s.* for his wages, and asked him to stay on till *Old Michaelmas*, which he agreed to do on being paid for it; he staid till *Old Michaelmas*, and received 1*s.* 6*d.* for that time.

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Reader and *Holbeck*, in support of the order of sessions, contended, that the pauper had not gained any settlement by hiring and service. This species of settlement depends upon the statute 3 *W. & M. c. 11. s. 7.* and 8 & 9 *W. 3. c. 30. s. 4.*; the first of which provides, "that if any unmarried person not having children shall be lawfully hired into any parish or town for one year, such service shall be judged and deemed a good settlement." And the second enacts, "that no person so hired as aforesaid shall be deemed to have a good settlement unless he continue in the same service for one whole year." So that it should seem from the words of the statute that it is necessary that there should be a hiring for a year, and a service for a year, under that contract. The words "such service" in the first act obviously refer to a service under the lawful hiring previously spoken of. The second act was framed to obviate doubts which had existed whether a service for forty days under a hiring for a year would not confer a settlement. The legislature by the words "whole year" in that act must mean *the* year for which the parties had hired. It is true that there have been many cases in which a service under a hiring for a less period than a year may be coupled with a service under a hiring for a year. But those cases are so contrary to the plain meaning of the statute, that the Court will not be disposed to extend them any further, but will rather be desirous of getting back to the fair construction of the statute. In all those cases the hiring for a year was subsequent to the hiring for a less time, but in the present case the hiring for a year is first; and by the subsequent agreement that contract of hiring is entirely dissolved. How then can it give effect to the subse-

quent service so as to confer a settlement. *The King v. Great Chilton (a)* is directly in point: there a man who had hired for a year served only a part of the year, and then married; on which he hired again for the same period, but upon different terms; and although he served more than a year, and there was not any interval between the two contracts, yet the Court held he did not gain a settlement, upon the ground of the dissolution of the first contract. So here, the first contract is dissolved, and no settlement is gained. In this case too the pauper did not serve forty days at the time when this contract was in existence.

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tants of
PILLOWLEY.

LORD ELLENBOROUGH C. J. If the statutes are to be strained in any respect, it seems to me that the mind revolts much more from coupling a previous service with a subsequent hiring for a year, than from the conclusion to be drawn in the present case. I think this case therefore within the limits of the former decisions. If it were now for the first time under our consideration, I should be disposed to pronounce a different judgment: but the decisions are so numerous upon the subject, and we should overturn so many settlements if we were to overrule them, that I feel myself bound by their authority to hold this to be a good hiring and service.

BAYLEY J. I am of the same opinion upon the ground of the authorities alone. There is in this case a hiring for a year, and a service for a year, and that according to the decisions will be sufficient to confer a settlement.

(a) 5 T. R. 672.

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FILLINGLEY.

ABBOTT J. I am of the same opinion, and I think that it is better to abide by the fixed and settled rule of construction given by the decisions, than to introduce any new questions by departing from them.

HOLROYD J. concurred.

Order of Sessions quashed.

Scarlett, Reynolds, and Finch, were to have argued against the order.

Wednesday,
Feb. 4th.

The KING against The Inhabitants of ALL
SAINTS, WORCESTER.

A clerk in a mercantile house, hired by the year, but serving only during the usual hours of business, thereby gains a settlement, although those hours did not, by the custom of the trade, ever occupy the whole day, and he went where he pleased, without asking his master's leave, when those hours were over.

UPON appeal, the quarter sessions for the county of Worcester, quashed an order of justices for the removal of *Alfred Canning* and *Ann* his wife and their two children, from the parish of *All Saints* in the city of Worcester to *Shoreditch* in the county of *Middlesex*, subject to the opinion of this Court in the following case:

The pauper *Alfred Canning* in the year 1812, was engaged by Messrs. *Bruce, De Ponthieu, and Co.* for a year, at the yearly salary of 80*l.*, as one of their house clerks at their *East India* agency house, in *Saint Peter Le Poor* in the city of *London*. The pauper went into the service, and continued in it upon the same terms for two years and a half, during the last eight months of which he slept in the appellant parish of *Shoreditch*. He did not sleep in the house of Messrs. *Bruce, De Ponthieu, and Co.* during any part of his service, but came to their counting-house at the

usual mercantile hour, (that is to say) about nine o'clock in the morning, and staid there till five or six o'clock in the evening, with the exception of half an hour or an hour in the course of the day, when he went away for the purpose of getting his dinner; the hour of which varied to accommodate the other clerks, of whom there were thirty or fourty. When the business of the counting-house closed in the evening at the usual mercantile hour, the pauper went where he pleased, without asking any leave of Messrs. *Bruce, De Ponthieu*, and Co., and he also went where, and did what he pleased on Sundays. The court of quarter sessions was of opinion, that, under the circumstances, and from the nature of the pauper's employment, he was not so under the control of Messrs. *Bruce, De Ponthieu*, and Co., as to be considered to have gained a settlement in *Shoreditch* as a yearly servant.

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WORCESTER.

Puller in support of the order of sessions. In the *King v. North Nibley (a)*, Lord *Kenyon* lays down the rule thus: there must be a hiring and service for a year so far as that the servant must be under the control and coercion of the master during the whole time; and in that case where the service was under a hiring for five years to serve twelve hours each day, the Court held, that no settlement was gained; and in the *King against Buckland Denham (b)*, which was a hiring for five years to work only during *Shearman's* hours, the Court pronounced a similar decision. Here the case states the hours when the pauper was employed and when not; he came at nine o'clock in the morning, and stayed the usual mercantile hours; at other times

(a) 5 T. R. 21.

(b) Burr. S. C. 694.

he

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he did what he pleased and went where he pleased: the custom of the trade must be considered as part of the contract. Could the master have compelled his service out of the usual hours? or suppose he had brought an action for not attending at other times, could he have sustained it? here it is stated, that he was hired as a clerk, and also what the usual hours of a clerk's attendance were.

LORD ELLENBOROUGH C. J. There is in every contract of hiring some implied exception of hours for relaxation, food, and rest; I cannot at least suggest to myself any contract in which such exceptions do not exist. The master here has a right to the service of the pauper at all times, but he does not require his services at any other hours than those mentioned: there is not any exception in the contract. The hiring then being general, and there being no exception but such as are necessarily implied in every contract, I think that the pauper by serving under it for a year, gained a settlement in the parish of *Shoreditch*.

BAYLEY J. The distinction between the two classes of cases relative to this subject is, that in the one the exception to the service is expressed in the contract, and in the other it is left by the custom of the particular trade to be raised by implication. This case seems to me to range itself under the latter class; and therefore I think the pauper gained a settlement by this hiring and service.

ABBOTT and HOLROYD Js. concurred.

Order of sessions quashed.

Russel was to have argued contra.

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The KING *against* The Inhabitants of WOOD-
HURST. *Wednesday, Feb. 4th.*

UPON appeal against an order of two justices, by which *George Herd*, his wife, and their three children, were removed from the parish of *Saint Ives* in the county of *Huntingdon* to *Woodhurst* in the same county, the sessions confirmed the order, subject to the opinion of the Court on the following case:

In the year 1809, *George Herd* the pauper, being legally settled in *Woodhurst* in the county of *Huntingdon* and unmarried, was afterwards hired by *William Margetts* of *Saint Ives* in the said county, brickmaker to work in *Saint Ives* under a written agreement which *Mr. Margetts* states to be lost, and to be as follows:

“ I *George Herd* have this day agreed to serve *William Margetts* as a brickmaker from *Michaelmas* to *Michaelmas* again. The said *George Herd* engages to make 70,000 bricks at so much for digging and turning, so much for moulding and making, and so much for running to the kiln.” This was all the contract; nothing was said as to the time he was to begin to dig; he probably began in *November*, and then worked on the said kilns under that contract, not having finished his 70,000 bricks till after *Michaelmas* following. It appeared from the evidence of the master and pauper, that as soon as the pauper had made the 70,000 bricks according to his contract, his master had no controul over him, and he might go where he pleased, even if it was a month before *Michaelmas*, and if he stopped and made more than 70,000 bricks he was to be paid
for

A pauper agreed to serve as a brickmaker from *Michaelmas* to *Michaelmas*, and to make 70,000 bricks at a stipulated price: Held that this was not a contract for a year's service absolutely, but a contract to serve till the completion of the job; and therefore a settlement was not thereby gained.

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for them, and the master could set him to no other work than brickmaking. This was the custom of those kilns, but the pauper this year did not finish his contract till after *Michaelmas*, 1810. The pauper lodged and boarded himself in *Saint Ives*, and drew so much money on account of the bricks in the winter, and so much in the summer; and when the bricks were all made the account was settled between the pauper and his master.

Hart, in support of the order of sessions, was stopped by the Court who called upon

Nolan, contra. The contract in this case was for a year's service. Although it be engrafted upon it as a condition that a given number of bricks shall be made, the contract must be construed by itself, and the apprehension of the master or pauper as to its effect can make no difference; and although they might think that as soon as the bricks were made all controul of the master over the servant ceased; yet the Court will look to the very words of the agreement, and must thence conclude that that was not so, but that the master's controul would not cease until the end of the year. The objection respecting the uncertainty of the time when the pauper's service commenced is wholly immaterial; for at whatever time he might go into the service, his being received by his master would be conclusive evidence that his previous service had been dispensed with.

LORD ELLENBOROUGH C. J. In this case the Court can entertain no doubt. There was not a contract which, properly speaking, had relation to time.
The

The pauper engages to serve only until a particular job be done: if the bricks were made before the year expired, his service would terminate. So that unless he finished the last brick exactly at the year's end, which would be very improbable, he would not serve for a year. It is therefore only a contract for that individual job, and the introduction of time into the agreement is wholly irrelevant.

Per Curiam,

Order of sessions confirmed.

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against
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tants of
WOODHURST.

The KING *against* The Inhabitants of ST. MARY'S, *Wednesday,*
LEICESTER. *Feb. 4th.*

TWO justices, by an order, removed *Mary Bacon* widow and her four children, from the parish of *Wing* in the county of *Rutland*, to the parish of *St. Mary's* in the borough of *Leicester* in the county of *Leicester*. The sessions, on appeal, confirmed the order. But both orders being removed by certiorari, into this court, a rule was obtained calling on the parish officers of *Wing*, to shew cause why they should not be quashed, for a default of jurisdiction in the magistrates making the original order apparent upon the face of it, in not stating them to be justices of the peace of the county of *Rutland*. The order was in this form:

" County of *Rutland*. To the churchwardens and overseers of the poor of the parish of *Wing* in the said county, and to the churchwardens and overseers of the poor of the parish of *St. Mary's*

An order of magistrates was directed to the parish of *W.* in the county of *Rutland*, and also to the parish of *M.* in the county of *Leicester*, and the words " County of *Rutland*" were then written in the margin, and the magistrates were, in a subsequent part of the order, described as justices of the peace for the county aforesaid: Held that it thereby sufficiently appeared that they were justices for the county of *Rutland*.

in

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against
The Inhabi-
tants of
St. Mary's,
Leicester.

in the borough of *Leicester* in the county of *Leicester*, and to each and every of them.

Rutland, } Upon the complaint of the churchwardens
to wit. } and overseers of the poor of the parish of
Wing, in the said county, made unto us whose names are hereunto set, and seals affixed, being two of his Majesty's justices of the peace in and for the said county, and one of us of the quorum, that *Mary Bacon*, &c. are come to inhabit, &c. (pursuing the usual form of such orders)."

Reader, shewed cause against this rule. He contended, that on the face of the order of the two magistrates, it was quite obvious, that they were magistrates of the county of *Rutland*. That unless the Court were bound by the cases to decide the contrary, the reason of the thing was very plainly in favour of the order. The words justices of the peace for the said county, immediately follow the description of the parish of *Wing* in the county aforesaid. Then "said county" must refer to the county in which the parish of *Wing* is situated. And by reference to the commencement of the order, it clearly appears that *Wing* is in the county of *Rutland*. Besides, the words "*Rutland*, to wit," are placed a second time in the margin, which if possible, makes the thing still more evident to every one who reads the order.

Marriott, contra, quoted the cases of *The King v. Chilverscoton* (a), and *The King v. Moor Critchell* (b), which he contended were cases precisely similar to the present, in which the same objection now prevailed.

(a) 8 T. R. 178.

(b) 2 East, 66.

And

And he observed that the latter case was peculiarly strong, as there Lord *Kenyon* found himself compelled by the authorities, although very reluctantly, to quash the orders.

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LEICESTER.

LORD ELLENBOROUGH C. J. If this Court is put under the painful necessity of overruling the case of *The King v. Moor Critchell*, in order to do justice in this case, I have no hesitation in so doing. The words "justices of the peace in and for the said county" in that case immediately follow the words "the county of *Wilts* aforesaid," and in plain grammatical construction can have reference to the county of *Wilts* only. For the word *said* must have reference to the last antecedent, and I wish that the very able and very learned Judge who decided that case, instead of lamenting that such an objection had there been taken, had applied his powerful mind to the objection itself, and I have no doubt that it would have vanished before that mind exerting its proper vigour on the subject. Here there is first "county of *Rutland*" in the margin, then come the words "parish of *Wing* in the said county;" that must mean the county of *Rutland*, if we are to give the word *said* any meaning at all. Then immediately follow the words "justices of the peace for the said county;" that must therefore also have reference to the county of *Rutland*. The grammatical construction and plain meaning of the instrument direct us to that conclusion alone.

BAYLEY J. It is impossible to doubt in this case to what county the magistrates who made this order belonged. *The King v. Moor Critchell* is undoubtedly a

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very strong authority, and perhaps not distinguishable from this case; but that case does not convince me. I think the Court ought there to have come to a contrary conclusion. In that case the words "said county" could only mean in grammatical construction and common sense the county of *Wilts.* Now here "said county" must mean *Rutland*, and not *Leicester*. Besides, in this case, after the direction of the order, there are found in the margin the words "county of *Rutland*, to wit," which make the case much stronger. Then if there be no doubt to which county the word *said* refers, the objection cannot prevail.

ABBOTT J. The case of *The King v. Moor Critchell* was a decision not establishing any general rule of law, but turning upon the construction of the terms of that particular instrument, and has not, I believe, been since recognized or acted upon. Even if this case were precisely similar to that, I should say that the Court there had not adopted the true construction, nor that which was warranted by the ordinary rules of criticism or language. Here however there is a distinction; the county here is named for the second time in the margin, and we may therefore begin to read the instrument from that part; if so, there will be no doubt; for the county of *Rutland* is the only county named to which the word *said* can have any reference.

HOLROYD J. I am of opinion that this order ought to be affirmed. It appears in the beginning of the order that the "parish of *Wing* in the said county" must have reference to the county of *Rutland*; and it is afterwards stated that the justices made the order upon the complaint

plaint of the churchwardens and overseers of that parish. Then, as no other justices except magistrates of the county of *Rutland* could by law make the order, the Court will intend that the words "*said county*" have reference to the county where the magistrates had jurisdiction; for that construction which supports, and not that which destroys the instrument, may fairly be adopted; and the words "*said county*" may ut res magis valeat quam pereat have reference to the county of *Rutland*.

Order affirmed.

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See Adams v Brown & Bing 21

BAILLE *against* DE BERNALES.

Thursday,
Feb. 5th.

A RULE nisi having been obtained for security for costs, and for staying proceedings, on the ground of the plaintiff's residing abroad,

Puller now shewed cause, and contended that the rule ought to be discharged, inasmuch as the affidavits in support of it did not state that any previous application had been made for such security to the plaintiff's attorney; and he cited *Bass v. Clive* (a), in which it was laid down as an universal rule, that the authority of the Court was not to be interposed without ascertaining whether the party will refuse to give security; and he observed, that the rule in this case was to stay the proceedings also, which clearly could not be asked without a previous application.

The Court will compel security for costs where plaintiff resides abroad, without a previous application to his attorney; but they will not order a stay of proceedings unless such application has been made.

Barneswall, contra. In *Bass v. Clive* the plaintiff resided in this country, and an application might have been

(a) 3 M. & S. 283.

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against
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made to him personally. Here, the plaintiff residing abroad, no such application can be made, which is a material distinction between the two cases.

BAYLEY J. (a) It certainly was the invariable practice of the Court before the case of *Bass v. Clive* to compel security for costs without requiring a previous application. This case is however distinguishable from the case cited, the plaintiff there being resident in this country. I have always understood the distinction to be that previous application is necessary where a stay of proceedings is sought for, but not where security for costs is alone the object of the rule; and inasmuch as this rule is drawn up for both, and no such application is shewn, I think it should be made absolute for security for costs, and that only upon payment of the costs of the motion.

Rule absolute.

(a) The only Judge in court.

Thursday,
Feb. 5th.

HARMER *against* HAGGER and CLARK, Bail
of PAYNE.

Where the defendant in an action has become bankrupt, and obtained his certificate, after which proceedings are

taken against the bail, the Court will, on motion, relieve them, and will not direct an issue to try the fact of the bankrupt's being a trader, the certificate, by the 5 G. 2. c. 30. s. 7. and 13, being made sufficient evidence of the trading, &c.

But no exoneretur having been entered on the bail-piece, such relief was granted only on payment of costs.

THE defendants became bail in *Trinity*, 1816; a commission issued against *Payne* in *October* following. In *November* in the same year, the plaintiffs obtained final judgment, and in the *February* following

Payne

Payne obtained his certificate. The bail was not fixed till *June*, and in *Dec.* 1817 the amount of debt and costs was levied. A rule nisi having been obtained for setting aside the proceedings, and returning the money, and that plaintiff should pay the costs of the application, upon affidavits disclosing these facts, and that the plaintiff and his attorney knew that *Payne* had obtained his certificate before they took any proceedings against the bail,

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Richardson now shewed cause on an affidavit which impeached the validity of the commission, on the ground that *Payne* was not a trader, and contended that the stat. 5 Geo. 2. c. 30. s. 7. and 13. was only applicable to the case of an action against a bankrupt, but that in a proceeding against the bail the validity of the commission might be disputed; and in *Willison v. Smith* (a), and in *Yeo v. Allen*, *Hil.* 23 Geo. 3. (b), the Court directed issues to try the fact; and on the authority of *Manning v. Godshall* (c), the rule at all events could be made absolute only upon payment of costs.

F. Pollock, in support of the rule. The 5 Geo. 2. c. 30. s. 7. expressly makes the certificate sufficient evidence of the trading, bankruptcy, commission, and other proceedings precedent to the obtaining of the same, and therefore in this case there is not any ground for directing an issue to try the question whether the bankrupt were a trader or not; and inasmuch as the plaintiff and his attorney knew of the certificate having been obtained, and afterwards proceeded against the bail, this rule ought to be made absolute with costs.

(a) *Tidd's Prac.* 281.(b) *Ibid.* 215.(c) 14 *East*, 599.

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The Court thought that the bail should have applied for an exoneretur, but that the plaintiff could not as against them dispute the validity of the commission, the 5 Geo. 2. c. 30. s. 7. having made the certificate sufficient evidence of all the previous proceedings; the rule therefore was made

Absolute, upon payment of costs.

Monday,
Feb. 9th.

DUNLOP against GILL and Another; in
Error. (a)

The 45 G. 3. c. 34. only repeals the navigation acts as to foreign-built ships, and does not confer upon them (when navigating under its provisions with the king's licence) all the privileges of British-built ships; and therefore the former cannot trade to the western coast of America without a South Sea licence.

Quere, Whether 42 G. 3. c. 77. authorizes British-built ships so to trade without such licence.

ACTION on a policy of insurance brought in the Court of Common Pleas. The declaration set forth a policy on the *Portuguese* ship the *Bons Irmaos*, lost or not lost at and from *Lima* or any other ports, island or islands, on the coast of *South America*, to any ports in *Great Britain*, with liberty to touch, stay, and trade, receive, discharge, or exchange property or papers at any ports whatsoever, as well on this as on the other side of *Cape Horn*. The insurance was on goods; and by a memorandum indorsed on the policy, it was declared that the insurance was on goods, dollars, bullion, both or either, the dollars valued at 4s. 3d., against all risks whatever. By a second memorandum the ship was to be allowed to go to *Cadiz* without being deemed a deviation. The premium was eighteen guineas per cent., and the loss was alleged in the declaration to have been by the ship in the harbour of *Cadiz* being taken by certain persons acting under the command and authority of the government of *Spain*. Plea, general

(a) 2 Mer. Rep. 441.

issuc.

issue. On the trial at *Guildhall* before *Gibbs C. J.* a special verdict was found. The Court of Common Pleas, after argument, gave judgment for the plaintiffs, to reverse which judgment the defendant brought a writ of error. The special verdict stated in substance that the policy of assurance was on the 23d day of *May*, 1808, duly subscribed, and the premium received by the defendant below; that a licence dated the 30th day of *March*, 1807, was granted by his majesty, by and with the advice of his majesty's privy council, to *Messrs. Thomas O'Gorman, Gorman, brothers*, and other *British* merchants, authorizing them to export from the port of *London*, or any other port of the United Kingdom, to the *Spanish* colonies in *South America*, on board the within-mentioned *Portuguese* vessel the *Bons Irmaos*, and four other neutral vessels, *British* manufactures and produce, to proceed to *Lisbon* to take in quicksilver and other articles, and from thence to proceed to some of the *Spanish* ports in *South America*, and further permitting the said *Thomas O'Gorman* or his agents, or the bearer of his bills of lading, in return for the said goods so to be exported, to convey and import by the same vessels to any part of the United Kingdom such quantity of the produce of the *Spanish* colonies and bullion as might be specified in their bills of lading to whomsoever such property might belong, and, notwithstanding all the documents accompanying such returns, should represent the same to be destined to a neutral or hostile port, that the above-mentioned licence was to continue in force twenty-four months, commencing from the date thereof; and that by a subsequent order in council and licence, both dated the 24th day of *March*, 1809, the duration of the former licence was

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prolonged for one year; that under the authority granted by these licences the plaintiffs below, who were *British* merchants, exported on board the *Portuguese* vessel the *Bons Irmaos* a quantity of *British* manufactures from the port of *London* to *Lima* in the *Spanish* colonies in *South America*; that the ship sailed from *London* on her outward voyage on the 11th day of *September*, 1807, and arrived at *Callao*, the port of *Lima*, in *December*, 1808, where her outward cargo was landed and sold; that in *March*, 1809, 73 cases and 40 serons of bark, the produce of the *Spanish* colonies, and 10,808 dollars in specie, being the goods and bullion insured by the within-mentioned policy of assurance, and which were the returns of the goods as above exported, were laden on board the *Bons Irmaos* by *Thomas O'Gorman* at *Lima* for the account of the plaintiffs below, for the purpose of being imported into the United Kingdom; that the bills of lading for the goods and bullion were by *Thomas O'Gorman* duly transmitted to and received by the plaintiffs below; that the *Bons Irmaos* in *April*, 1809, sailed from *Lima* on the voyage insured, and in the prosecution of that voyage was in *October*, 1809, captured and detained in the harbour of *Cadix*, where her cargo was seized by persons acting under the government of *Spain*, and the plaintiffs below thereby wholly lost the goods and bullion above mentioned; that neither the plaintiffs below nor *Thomas O'Gorman* had, during all the time above mentioned, any licence from the *South Sea Company* authorizing them to trade within their limits, and that *Lima* is situated within those limits; that before and on the 30th of *March*, 1807, and from thence continually to the present time, *Great Britain* was in amity with *Portugal*, and at war with *Spain*;

Spain; and continued also at war with *Spain* until the 4th day of *July*, 1808, on which day, by an order of the king in council, all hostilities between this kingdom and *Spain* ceased. This case was argued in last *Michaelmas* term, when

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Richardson, for the plaintiff in error, contended, that by the 9 *Anne*, c. 21. s. 47., the voyage was illegal, being a violation of the *South Sea* Company's charter. It would however be contended by the other side, that the king's licence stated in the special verdict dispensed with the necessity of having a *South Sea* licence; that would be contended for in two ways. First, That by the 42 G. 3. c. 77. *British*-built vessels were permitted to trade to the *South Seas* without a licence from the *South Sea* Company, and that by 45 G. 3. c. 34., foreign vessels were entitled to the same privileges. Secondly, That the 45 G. 3. c. 34. alone would legalize this voyage. Admitting that 45 G. 3. c. 34. had placed *British* and foreign vessels on the same footing, still 42 G. 3. c. 77. did not authorize *British*-built vessels to trade to the *South Seas* without a *South Sea* licence. The intent of this act was to encourage the fisheries; the title speaks only of the fisheries; the preamble speaks only of navigation and fisheries; the word trade does not there occur. Now if it had been the intention of the legislature to give a general right of trading, they would in all probability have mentioned trade in the preamble of the act, which they have not done. Then comes the enacting clause in these words, "It shall and may be lawful for any *British*-built ship or vessel, owned and navigated according to law, to pass through the Straights of *Magellan* or round *Cape Horn*

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Horn, and to carry on the fisheries in the *Pacific Ocean* from *Cape Horn* to 180 degrees W. L., and to trade within the said limits without licence, &c." Here the words certainly are "and to trade" generally. They would undoubtedly cover any trade whatsoever. But the question is what the legislature meant by them. They must have meant a trade connected with or ancillary to the fishing adventure. In the course of a long voyage some trade may become necessary. They may want to barter for provisions or for stores to refit the vessel. But the principal object of the voyage must be the fishing adventure. The Court will not lightly, and upon a dubious construction of an act of parliament, suffer the chartered rights of companies to be invaded. These companies originally purchased their charters, and where their monopolies are to be taken away, the legislature as in the 55 G. 3. c. 57. give compensation. Here no compensation is given, and therefore the legislature could not have intended to take away the monopoly of the whole western coast of *South America* from the *South Sea Company*. It appears that the legislature was not aware of this supposed effect of 42 G. 3. c. 77. when they passed 47 G. 3. c. 23. If this construction of 42 G. 3. c. 77. were to prevail, that act was nugatory as to the west coast of *South America*. Nothing could be more absurd than passing such an act in that case. But then there was the authority of *Jacob v. Jansen* (a) on the other side. It is to be however observed, that there at first *Mansfield* C. J. seems to have doubted, and after all his judgment is expressed in very measured language. He says, "we think it better to decide." Now that is not

(a) 3 Taunt. 534.

giving

giving a very strong opinion on the point. On the second point, the 45 G. 3. c. 34. alone will not legalize this voyage; that act cannot be construed to give neutral ships privileges which *British* ships did not possess. Its only object was to repeal for the time of war that part of the navigation act which prohibited importation from *South America* in foreign ships. It has no further effect. If, therefore, *British* ships did not possess the right of trade, the 45 G. 3. c. 34. will not alone give it to foreign ships.

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E. Alderson, contra, contended, first, that taking the limited construction of 45 G. 3. c. 34., and coupling that act with 42 G. 3. c. 77., the necessity of a *South Sea* licence was in this case dispensed with. It was admitted by the other side, that 45 G. 3. c. 34. placed foreign and *British* ships on the same ground. Then what were the privileges which *British*-built ships then possessed. This would depend on the construction to be given to 42 G. 3. c. 77. It was said that the title of that act only referred to the fisheries. But an act must not be construed by its title, but by the preamble and enacting clauses. Then what are the words of the preamble. They relate to navigation and fisheries. It is observable that navigation is mentioned first. Now the meaning of that word is, in the law of *England*, a sailing for the purposes of trade. The 12 Car. 2. c. 17. refers exclusively to trade, and is called the navigation act. Its title is, "An act for encouragement of shipping and navigation." The preamble here therefore does by the word navigation refer to trade, and to trade before fisheries. The enacting clause is still stronger. That clause gives permission to carry on the fisheries within

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within certain specified limits, and to trade within those limits. Now it is contended by the other side, that this trading must be connected with fishing, and that a ship may not trade unless she fish also. But this argument will go too far. For if fishing and trading are to be thus indissolubly connected, it will follow that a ship cannot fish unless she also trade. There is just as much reason that this should be the construction as the other. For the words "to carry on the fisheries," and "to trade," are equally prominent in the clause. But this last construction would be very inconvenient. The greater part of the fishery in the *Pacific Ocean* is far out of the limits of the *South Sea* monopoly. Suppose a ship in the 180th degree W. L. If she, in order to legalize her fishing, must trade, she will have to beat up to the west coast of *America* for the purpose of trading there. This would be a great loss of time, and a great restriction on the fisheries. And so this act, which has for its title the encouragement of the fisheries, would be in fact superadding a restriction, instead of conferring a benefit. But the construction contended for by the defendants in error was not liable to this objection. They contended, that the act legalized either a joint adventure of fishing and trading, or separate adventures of fishing and trading; so that a ship might fish alone, or trade alone, or fish and trade also without a licence. This would give complete effect to the preamble. This was the construction put on the act in *Jacob v. Jansen* (a) by the Court of Common Pleas. And in that case, though *Mansfield C. J.* was at first surprised at the circumstance of the 42 G. 3. c. 77. being relied on, for his

(a) 3 *Taunt.* 534.

words rather imply surprise than doubt, yet on fuller consideration he and the whole Court gave judgment for the plaintiff there. That case is therefore a decisive authority for the defendants in error. These acts are for the general benefit of trade, and ought to receive a liberal construction. [Lord *Ellenborough* C. J. But they ought to be construed *salvâ fide* to those whose rights are affected by them.] The 47 G. 3. c. 23. it is said could never have been passed if this were the true construction of 42 G. 3. c. 77. But that act was necessary to legalize a trade with the east coast, to which at all events 42 G. 3. c. 77. does not apply. And the only circumstances which led to the passing of that act, viz. the occupation of *Buenos Ayres* and *Monte Video* by the *English* troops, were applicable to the east coast. The attention, therefore, of the legislature was not particularly directed to the western coast. And though the western coast is mentioned in the act, yet that may have arisen from the legislature copying the clause out of the *South Sea* act, and repealing it in the 47 G. 3. But similar instances may be found in other acts, of the legislature enacting the same clauses twice over. There is a remarkable one in 22 G. 3. c. 25. s. 1., which, although a clause in a perpetual act, is re-enacted in terms in 33 G. 3. c. 66. s. 37, 8, 9., and 43 G. 3. c. 160. s. 34, 5, 6. It does not therefore follow because the 47 G. 3. c. 23. applies in terms to the west coast, that the construction in *Jacob v. Jansen* of 42 G. 3. c. 77. is wrong. On the second point he contended, that 45 G. 3. c. 34. alone would legalize the voyage. The words of the enacting clause are there general. The goods are to be permitted to be imported, "any law, custom, or usage to the contrary notwithstanding."

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Now these general words must include and take away the exclusive privilege established by the *South Sea* act. Where, as in many of the fishing acts, the *South Sea* Company are intended to be exempted, they are so expressly. In the *South Sea* act itself, the privileges of the *East India* Company are taken away by general words of this sort, although the *East India* Company are not mentioned in the act. If the Court should hold that a licence from them was necessary, it would give them an overruling discretion over the king, for they might refuse to license those whom the king had licensed. And so the whole object of the 45 G. 3. c. 34. might be frustrated. And as to the objection, that this would be giving foreigners a preference over natural-born subjects, it is to be observed, first, that *British* ships could not then traffic with the *Spanish* colonies, nor could the *South Sea* Company themselves do so; for we were then at war with *Spain*: and, secondly, that as all this was to be done by the king in council, it must be presumed that he would not grant licences where any undue advantage was given to foreign ships.

Cur. adv. vult.

LORD ELLENBOROUGH C. J. now delivered the judgment of the Court.

This case came before us by a writ of error from the Court of Common Pleas. It was an action brought in that court, on a policy of insurance on goods in a *Portuguese* vessel, at and from *Lima*, or any other port on the coast of *South America*, to a port in *Great Britain* or *Ireland*. A special verdict was found, by which it appeared, that the voyage was from *Lima*, and that his majesty's license had been

granted in conformity to the provisions of the statute 45 G. 3. c. 34. The Court of Common Pleas gave judgment for the plaintiff in that court. The question argued before us upon the writ of error was, whether a licence from the *South Sea* Company was necessary to enable the parties being *British* subjects legally to prosecute this voyage. It is clear that such a licence would be necessary under the statute 9 Ann. c. 21. unless the necessity has been removed by some subsequent statute. On behalf of the defendant in error, it was contended, that this was done by the statute 45 G. 3. c. 34. connected and construed with the statute 42 G. 3. c. 77. It was said, that the statute of the 42 G. 3. had enabled a *British* subject to trade in a *British*-built vessel to that part of the western coast of *America* where *Lima* is situate, without a licence from the *South Sea* Company, and that the statute of the 45 G. 3. had enabled a *British* subject to trade in the vessel of a friendly state licensed according to that statute, with the same freedom as he might lawfully do in a *British*-built ship. The case of *Jacob v. Jansen* (a) was quoted as an authority for the first of these two propositions, viz. the enabling effect of the 42 G. 3. It is necessary, however, to the case of the defendant in error that he should be able to maintain both his propositions; and as we are of opinion that the latter proposition, which was not much discussed in the Court of Common Pleas, viz. the enabling effect of the 45 G. 3., cannot be maintained, it is unnecessary to give any opinion upon the former. The privileges of the *South Sea* Company were conferred upon them by

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a royal charter granted in pursuance of an act of parliament, and in consideration of a price paid by the Company to the public. They are private rights, and could not therefore in our opinion be taken away without a plain declaration on the part of the legislature, that it was intended so to do, or without some clear and unequivocal expressions from which such plain intent must have been inferred. But upon the perusal of this statute of the 45th of his majesty, there is not found in it one sentence, or even one single word, that bears reference or allusion to the *South Sea Company*, not even the word "charter," which is found in the act of the 42d year. The statute was passed in a time of war, and was to have continuance only during a season of war, when the great demand for *British ships* and *British seamen* was thought to require a relaxation of those acts of navigation by which, generally speaking, the vessels of another state are prohibited from importing foreign produce into this country. It begins by reciting that by the laws now in force, no goods, &c. of *America*, can, except in certain cases, be imported into this kingdom, but in *British-built ships*, owned and navigated according to law; and that it is expedient, under the present circumstances, to permit certain goods to be imported in foreign ships belonging to subjects of friendly states. From this recital or preamble we see the object of the legislature, and we perceive that it has reference to the acts of navigation; and, therefore, unless the terms of the enactments that follow introduce some other object, we cannot presume that any other was intended. But the enactments do not introduce any other object. It is enacted that his majesty, by the advice of his privy council, may
grant

grant licence to *British* subjects to import from any country in *America*, belonging to any foreign *European* state, any goods, &c. not prohibited to be used in this kingdom, in any vessel belonging to any state in amity with his majesty, subject to such restrictions as the privy council may impose, and subject to the same duties as if the importation were made in a *British*-built ship, and to the same rules, &c. respecting the payment of those duties any law, custom, or usage to the contrary notwithstanding. To the contrary of what? What is the prohibition that is no longer to have effect? We answer, the prohibition before spoken of, that is, the prohibition of the navigation acts to import in any other than a *British*-built ship. The statute does not say that the importation may be made in the foreign vessel as fully and freely, to all intents and purposes, as it might be in a *British* vessel which the argument seemed to suppose no words of such large and general import are to be found in it. No allusion to the privileges of the *South Sea* Company, or to any other matter or law prohibitory of such importation than the acts of navigation merely. It was argued, however, in support of the enlarged construction of this act, that unless such construction were adopted it would be in the power of the company to defeat the object of the legislature, and that its adoption would work no injury to the company, because at the time of the passing of the act the company itself could not, by reason of the war with *Spain*, trade with the *Spanish* dominions in *America*, and these were said to comprize the whole extent of coast to which any trade is actually carried on within the limits of the company's charter. As to the first of these topics, if the legislature had anticipated

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pated that its object would be defeated by any improper conduct on the part of the company, it must be supposed that care would have been taken to prevent that mischief by some plain enactment, and as the act has no such enactment, we must presume that the legislature had no such apprehension. Indeed the construction contended for would but in part prevent this supposed mischief, because the act of the 42d year applies only to the western coast of *America*, and therefore the two acts taken together would still leave this supposed mischievous power in full force as to the southern part of the eastern coast. And as to the last of these topics, the company might trade to *Spanish America*, even during the war, if they could obtain his majesty's licence, and the obstruction might be removed, as in fact it really was, even before the date of this policy, by a peace with *Spain*, though the operation of the act would continue during the war with another power. Topics of this sort only tend to shew what, in the opinion of those who urge them, might reasonably have been enacted, they might properly be urged in explanation of doubtful expressions, if any such had been found in the statute, but they cannot add to it any thing that is not found in it. The charter of the *South Sea Company*, and the acts of navigation, are things entirely distinct in their nature. The act of the 42d year abridges the rights of the company in the cases to which it extends, in favour of *British*-built ships alone. Suppose no such restrictions upon trade as those which are imposed by the navigation acts had existed when this statute of the 42d year of the king had passed, it is clear that although *British* subjects might have traded from all other parts of the world in vessels of any country, yet this statute would have

have enabled them to trade from the western coast of *South America* in *British*-built ships alone. The effect of the statute of the 45th year of the king is, as to the matters provided for by it, and during the period of its continuance, to place trade in the state in which it would have stood if the navigation acts had never existed. If those acts had never existed, a *British* subject could not have traded to the western coast of *South America*, in any other than a *British*-built ship, by reason of the privileges of the *South Sea* Company, which being originally general and applicable to ships of every country employed by *British* subjects, had been abrogated in favour of *British*-built ships alone, by the act of the 42d year of the king; and we think that the statute of the 45th year of the king does not affect those privileges. Upon this ground, therefore, that but for the 45 G. 3. there would have been two fatal objections to this adventure, viz. the want of a *South Sea* licence, and the importation in a vessel not *British*-built; and that the 45 G. 3. only removes the latter objection, and does not affect the former; we are of opinion, that the judgment below cannot be supported, and must therefore be reversed.

Judgment reversed.

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*Monday,
Feb. 9th.*

**The KING against The Inhabitants of ECCLES-
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Indictment against the inhabitants of a parish for not repairing a road. Plea, that the inhabitants of a particular district within the parish have immemorially repaired all the roads within that district, of which the road indicted was one: Held that this plea was good, although it did not state any consideration for the liability of the inhabitants of the district.

THIS was an indictment (in the common form) against the inhabitants of the parish of *Ecclesfield* for the non-repair of a common highway there. Plea, as to part of the road indicted, that the inhabitants of a certain district or division in the township of *Bradfield*, in the said parish of *Ecclesfield*, called *Ones Acre* and *Oughty Bridge*, from time whereof the memory of man is not to the contrary, have repaired and amended, and have been used and accustomed to repair and amend, and of right ought to have repaired and amended, and still of right ought to repair and amend, when and so often as it hath been or shall be necessary, such and so many of the common highways situate in the said district or division of *Ones Acre* and *Oughty Bridge*, as would otherwise be repairable and amendable by the inhabitants of the said parish at large. The plea then stated, that the part of the said road indicted was situate in the district, and would, but for the said prescription or usage, be repairable and amendable by the parish at large: and concluded, that by reason of the premises the inhabitants of the said district or division of *Ones Acre* and *Oughty Bridge*, in the township of *Bradfield*, in the said parish of *Ecclesfield*, during all the time last aforesaid, ought to have repaired and amended, and still ought to repair and amend the same part of the said common highway, so ruinous, miry, deep, broken, and in decay, in the introductory part of their plea particularly mentioned, when and so often as it hath been and shall

shall be necessary; and that the inhabitants of the said parish at large ought not to be charged with the repairing and amending the same. And this, &c. Wherefore, &c. There were similar pleas as to the other parts of the road indicted lying within other districts in the parish. Issues having been taken on these pleas, the case was tried at the summer assizes, 1816, for the county of York, before *Wood B.*, when a verdict was found for the defendants upon all the issues. In the following term *J. Williams* moved to enter up judgment for the crown non obstante veredicto, on the ground that all the pleas were defective. When cause was shewn, the Court ordered the question to be put into the form of a special case; which was argued in last *Michaelmas* term.

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J. Williams for the crown stated, that this was a new question, although for a long time it seemed to have been considered as *res judicata* from the uniform course of the precedents. The principle which governs cases of this sort is the same as that which applies to bridges; for a parish with respect to highways stands in the same situation as a county with respect to bridges. Lord *Coke*, in his *Commentary on the Statute of Bridges*, says (*a*), "Some persons, spiritual or temporal, incorporate or not incorporate, are bound to repair bridges *ratione terrarum suarum tenementorum*, and some *ratione præscriptionis tantum*. *Ratione tenuræ*, by reason that they and those whose estate they have in the lands or tenements are bound in respect thereof to repair the same. *Ratione præscriptionis tantum*; but herein there is a diversity between bodies politic or

(a) 2 *Inst.* 700.

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corporate, spiritual or temporal, and natural persons; for bodies politic or corporate, spiritual or temporal, may be bound by usage and prescription only, because they are local, and have a succession perpetual; but a natural person cannot be bound by act of his ancestors without a lien or binding and assets." There is, therefore, a clear distinction between natural persons and corporations. So in 21 *E. 4. Mich. term*, pl. 3. the same distinction prevails. Now by natural persons must be meant either individuals, or the collections of individuals, as the inhabitants of particular districts. If so, then the inhabitants of a district cannot be bound *ratione præscriptionis tantum*. The same rule is to be deduced from *Keilwey*, 52. pl. 4., where the point was with respect to charging individuals *ratione tenuræ*. These latter words indeed imply a consideration; and on this ground, in *Rex v. Kerrison (a)*, it was held that they were of so technical a description that they could not be supplied by equivalent expressions, such as "owner and occupier of a certain navigation." In *Rex v. The Inhabitants of Bridekirk (b)*, the plea stated a consideration. For there it set out that the parish was divided into districts, (naming them,) and stated a custom for all the districts separately and respectively to repair their own roads. Each district was therefore exempted from the repair of all roads not within it. That was a consideration for its repairing its own roads. In *The King v. Eardisland (c)* the pleas were similar. There is in this plea no traverse of the liability of the parish at large to repair. That is another objection. In *Rex v. The Inhabitants of the West Riding of Yorkshire, Glusburne Beck case (d)*, that

(a) 1 *M. & S.* 435.(b) 11 *East*, 304.(c) 2 *Compt.* 494.(d) 5 *Burr.* 2594.

traverse

traverse was introduced; and though Mr. Serjeant *Williams* in his note, 2 *Saund.* 159. c., says, that such traverse is demurrable, that is not so. *Rex v. The Inhabitants of the County of Glamorgan* (a), contained the same traverse; and the better precedents always have inserted it. This case is decided by *Rex v. St. Giles's, Cambridge*. (b) That was an indictment against the parish of *St. Giles* for not repairing a highway situated within it. The parish pleaded, that the inhabitants of the parish of *St. Mary's*, from time immemorial, had repaired, and of right ought to have repaired, and still of right ought to repair the road indicted. That was therefore a plea charging the inhabitants of *St. Mary's* *ratione præscriptionis tantum*. The Court there held, that it was necessary to state a consideration for that prescription, and the plea was held bad on that account. He then referred to *Rex v. The Inhabitants of Bagley* (c), *Crown Circuit Assistant* (d), and *Rex v. Great Broughton*. (e)

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Littledale, *contra*, contended, that if a traverse were necessary, that there was one in this case; for the plea, after stating the liability of the inhabitants of particular districts to repair and amend the road, concluded thus: "And that the inhabitants of the said parish at large ought not to be charged with the repairing and amending the same." This therefore is a traverse quite sufficient, if any traverse at all were necessary, which it is not. [He was then stopped as to this part of his argument by the Court, who said that certainly this was a sufficient traverse, if any traverse was required.] As

(a) 2 *East*, 356. *in actis*.

(b) Not yet reported.

(c) 12 *Mod.* 697.

(d) P. 227.

(e) 5 *Burr.* 2700.

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to the other point respecting the consideration for the prescriptive liability of the inhabitants of a particular district, no argument can be drawn from the form of plea in *Rex v. Bridekirk*; for that was adopted only with a view to let in evidence of the custom of repairing in the other districts of the parish. That form of pleading was also recommended by Mr. Serjt. Williams, in 2 *Saund.* 159. c. in the notes to *Rex v. Stoughton*, and was adopted in *Rex v. The Inhabitants of Leominster*. (a) But the form adopted here is the usual one. Formerly, indeed, the precedents were generally of an immemorial prescription to repair a particular road, it being considered doubtful whether an immemorial prescription could attach on modern roads. When that was established, the present form of plea was adopted. This form of pleading is found in *Rex v. The Inhabitants of Stretford* (b); and though errors were there assigned, this objection was never taken. In *Rex v. Great Broughton* Mr. J. Ashhurst says, "If you lay a charge upon persons against common right, you must shew how they are bound. It is not enough to shew that they immemorially ought to repair; it must be shewn that they have repaired." That is shewn here; and that is the way of shewing how they are bound here. So in *Rex v. The Inhabitants of Sheffield* (c), the same learned Judge says, "Where the indictment is against a township or particular persons, it must allege that from time immemorial they are bound to repair." In *Rex v. Marton* (d) and *Rex v. Penderryn* (e), the same point was ruled. But it never was a question in any of these cases whether any thing more than a prescription to repair need be

(a) 2 *Sanders*. 159. note.(b) 2 *Ld. Reym.* 1169.(c) 2 *T. R.* 106.(d) *And.* 276.(e) 2 *T. R.* 514.

stated.

stated. In *Rex v. The Inhabitants of the West Riding of Yorkshire* (a), and in *Rex v. The Inhabitants of the West Riding of Yorkshire* (b), the same form of pleading was adopted; and no objection was ever taken on this ground. The uniform course of the precedents printed, as well as MSS., is in favour of this plea. But even supposing a consideration to be necessary; it may be inferred from the word inhabitants: for inhabitants means here occupiers of land within the district. Then charging them as occupiers of land is in effect charging them ratione of their occupation of the land; and so there would be a consideration, viz. the occupation of the land, laid in this case. In the common case of ratione tenuræ you indict the tenant of the land. But an argument is founded on this; that here non constat but that the inhabitants of this district may be liable to repair the other roads of the parish: so they may; but that is not conclusive at all. The inhabitants of hundreds often repair bridges within the hundred, and yet contribute also to the general county bridge rate. So inhabitants liable to the repair of a particular chapel, nevertheless contribute to the church rate. (c) Here the inhabitants of a district may be considered as tanquam a corporation, and all the arguments relative to corporations apply to them. If so, then even on the authorities quoted by the other side, it is sufficient to charge them by prescription. If a consideration be necessary to be stated, it must also be proved: and how can an immemorial consideration be proved at nisi prius.

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(a) 5 Burr. 2594.

(b) 2 East, 351. in colis.

(c) And. 32.

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J. Williams, in reply, observed that the same argument as to the course of the precedents had been equally pressed in the case of *R. v. St. Giles's, Cambridge*, and had failed there. In the cases quoted, the objection was never taken and overruled. As to the word inhabitants importing a consideration, the same would apply to owner and occupier; yet those words were held insufficient in *Rex v. Kerrison*. A consideration might easily have been stated and proved, by shewing that the inhabitants of this district did not repair the other roads in the parish.

Cur. adv. vult.

Lord ELLENBOROUGH C. J. now delivered the judgment of the Court.

'This case stood over that the Court might look into the case of *Rex v. St. Giles's, Cambridge*. It was an indictment against the parish of *Ecclesfield*, for not repairing a road. The defendants pleaded as to part of the road, "that the inhabitants of a certain district or division in the township of *Bradfield*, in the said parish, called *Ones Acre* and *Oughty Bridge*, from time whereof the memory of man is not to the contrary, have repaired, and have been used and accustomed to repair, and of right ought to have repaired, and still of right ought to repair such of the said highways in that district or division as would otherwise be repairable by the inhabitants of the parish at large, and that the part pleaded to in that plea was within that district or division; that the district or division ought to have repaired it, and the parish ought not." There were other similar pleas as to other parts of the road indicted. Issues were taken upon these pleas, and a

verdict having been found for the defendants, an application was made to the Court to arrest the judgment, or to enter judgment for the crown, notwithstanding the verdict. And the Court directed that the matter should be discussed before them upon a special case, which was done accordingly. Two objections were taken, first, that it is necessary to shew some consideration to sustain a charge upon the inhabitants of any particular division of a parish to the repair of its highways, which is not done in this plea; and secondly, that the plea does not conclude with a traverse of the obligation of the inhabitants of the parish at large. The case has been argued before us, and in the course of the argument we declared that we thought there was no weight in the second objection; because, supposing such a traverse to be necessary, the conclusion in this plea in the words, "and that the inhabitants of the said parish at large ought not to be charged" was, in our opinion, a sufficient and effectual traverse. In support of the first objection, it was urged that the obligation upon the inhabitants of a parish to repair the highways within it is analogous to the obligation upon the inhabitants of a county to repair the bridges within the county; and that the inhabitants of the larger district are *prima facie* subject to the obligation, and cannot discharge themselves from it, without shewing in certain some other person or persons either natural or politic who are subject to it. It was further contended upon the authority of Lord Coke's Commentary on the Statute of Bridges, that although a body politic may be charged in these cases *ratione prescriptionis tantum*, yet natural persons cannot be so charged; but that in order to charge them,

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them, some good consideration for the charge must be shewn, such as the tenure of their lands or tenements; and it was said that the inhabitants of a particular portion of territory are to be considered as natural persons; much reliance, also, was placed upon the case of *The King v. The Inhabitants of St. Giles, in Cambridge*, lately decided in this court; we are of opinion, however, that the plea in this case is good, and that judgment ought to be given for the defendants. The plea alleges in substance, that the inhabitants of a particular division of the parish named in the plea have from time immemorial actually repaired the highway in question, and ought to have done so; so that it is not open to the objection which prevailed in some of the cases quoted in the argument, wherein the allegation was only "that the inhabitants of the minor district immemorially ought to repair, and there was no averment that they had in fact done so." The plea in the present case is conformable to the general course of precedents, both of indictments and pleas, relating to highways and bridges. Two instances only of a different form of pleading were mentioned at the bar; first, the case of *The King v. The Inhabitants of the parish of Bridekirk*. (a) In that case, the plea of the parish was in a different form; and alleged that the inhabitants of the several townships of the parish repaired, each, the highways within their own township, and so shewed an exemption, from the repairs of the highways, out of their own township; and by consequence a consideration for the sole obligation of repairing those that lay within it: but this was ex-

(a) 11 East, 304.

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plained by the gentleman, who drew the plea, to have been done for the particular purpose of opening a larger field of evidence at the trial. The other instance of a different form of pleading was quoted from 2 *Campb.* 494. The reasons of the form there used are obvious upon the perusal of the case; little weight, however, could be attributed to two instances of departure from the usual forms, even if the reasons had not appeared. In the argument in support of the motion, the matter of this plea was treated as a prescription; but we think it is more properly to be considered as a custom. There are two distinctions between custom and prescription mentioned by Lord Coke in *Gateward's* case, 6 Co. 60., which are material to the present purpose. A prescription always is alleged in the person. A custom ought always to be alleged in the land or place. Every prescription ought to have by common intendment a lawful beginning; but, as is well expressed by Mr. Justice Blackstone in his Commentaries, vol. i. p. 77., "customs must be reasonable; or rather, taken negatively, they must not be unreasonable; upon which account a custom may be good, although the particular reason of it cannot be assigned, for it sufficeth if no good legal reason can be assigned against it." Now the matter of this rule applies not to any particular individual, but to the inhabitants of a known district of country, and to a subject existing within that district; and it is of a local and not of a personal nature. It is a general rule of the common law, that highways and bridges are (except in certain excepted cases) to be repaired by the inhabitants of the territory wherein they are situate, as a charge upon the land within that territory, to be defrayed

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defrayed by the occupiers for the time being; the charge is upon the land, (under which word houses, &c. are included,) and upon the inhabitants in respect of the land, not in respect of their person or residence. An occupier of land is chargeable although he reside elsewhere; a resident, not being an occupier, such as an inmate or servant, is not chargeable. Taking this to be the general rule, the next thing to be considered is, the extent of the territory chargeable. Lord Coke, in his Commentary on the Statute of Bridges, having shewn how a corporation or natural person may be bound to repair a bridge, puts the case that none at all are bound, and then says that by the common law if the bridge be not within a franchise the inhabitants of the shire shall repair it; thus naming the largest division of territory known in this respect to the law: if it be within a franchise, then those of the franchise shall repair it. But upon reference to the statute itself, it is obvious that districts smaller than a county were in some cases chargeable to the repair. For the statute begins by reciting that "in many parts of the realm it cannot be known or proved what hundred, riding, wapentake, city, borough, town, or parish, nor what person certain, or body politic, ought of right to make such decayed bridges;" and for remedy enacts, "That in every such case the bridges, if they be without a city or town corporate, shall be repaired by the inhabitants of the shire; and if they be within any city or town corporate, then by the inhabitants thereof." And in *Magna Charta*, cap. 15., it is enacted, "That no town nor freeman shall be distrained to make bridges or banks but such as of old time of right have been accustomed to make them in the time of King Henry our grand-

grandfather." From both of which statutes it appears, that towns or districts smaller than a county had been accustomed in some cases to make bridges; and so in fact they continue to do until this day. And upon the whole it seems manifest, that the extent of the territory chargeable in this case is to be ascertained by usage and custom, and that in default only of an usage and custom to charge a smaller territory, the charge shall fall upon the larger, that is, upon the county. And as the case of parishes, and highways within them, is analogous to that of counties and bridges, the charge of repairing a highway shall fall upon the parish, in default of usage and custom to charge the particular portion of the parish wherein it is situate; and as a hundred, or parish, or other known portion of a county, may by usage and custom be chargeable to the repair of a bridge erected within it, so in like manner a township or other known portion of a parish may by usage and custom be chargeable to the repair of the highways within it. And upon an attentive perusal of the passages of Lord *Coke's* Commentary, which were cited in the argument, we think it plain, that in drawing the distinction between bodies politic and natural persons, the learned writer speaks of individual persons, and not of an aggregate of the inhabitants of parishes or other places. "A natural person," he says, "cannot be bound by the act of his ancestor without a lien or binding, and assets." The case referred to in the year-book was that of an individual. Ancestor and heir are words of well-known import in the law, but are not applied in strict legal language to the successive generations of inhabitants of a district. And indeed the inhabitants of a township, parish, or other known portion or division of the county

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considered with reference to matters belonging to it, and in which from their situation they have a common interest, bear a resemblance to corporate bodies; they may by custom claim and exercise easements in the land of an individual within the place, as a right to enter and remain upon it at seasonable times, for lawful pastimes and exercises; *Fitch v. Rawling and Others* (a); or to pass over it in their way to their parish church. In ancient times, the inhabitants of towns not corporate were charged and sued pro rege in the same manner as those of towns corporate, to aids and talliages, and for a firm or other debt due from their community, and for the receipt of the goods of felons and fugitives. Instances of these matters will be found in the *Firme Burgi of Madox*, c. 4. and 5. In all these cases, however, the subject of the charge or easement is some matter within the place. From what has been said, it will be obvious that the present case is clearly distinguishable from that of *The King v. The Inhabitants of St. Giles, in Cambridge*. In that case the highway in question lay out of the parish which it was attempted to charge; and upon that ground the Court there held the plea to be bad. All customs are purely local, and confined to particular places. There cannot be a custom in one place to do something in another. The land in a particular place, and the inhabitants in respect thereof, may be charged by custom, for matters within the place; but custom will not apply to matters out of it. Lord Coke observes at the end of *Gateward's* case, that the custom there alleged was insufficient and repugnant; because

(a) 2 H. Bl. 393.

it was alleged, that the custom there was, that every inhabitant of the town of *S.* had used to have common in a certain place in the town of *H.*, which was another town. And in *Foiston v. Crachrood* (a), it is laid down, that a copyholder may claim common of pasture, &c. within the manor whereof his tenement is parcel, by the custom of the manor; but that if he claims it in land which is not parcel of the manor, he cannot claim it by the custom of the manor, for the custom is *quod infra manerium talis habetur consuetudo*, and therefore he cannot apply it, or by force thereof claim any thing out of the manor. In the latter case, the known course is to prescribe in the name of the lord. If, therefore, the inhabitants of one district can be charged at all for a matter out of their district, (upon which point it is not here necessary to give any opinion, inasmuch as custom will not apply to the matter, and so they cannot be charged by custom,) the only mode of charge will be that of prescription; and as no common intendment can be presumed for such a charge, it will be necessary to shew some special matter, whereby a lawful beginning may be intended. Nothing of this sort was done in the case of *The King v. The Inhabitants of the parish of St. Giles, Cambridge*. That case is distinguishable from the present in the particulars already noticed. And for the reasons given, we think the present plea is good, and the rule therefore must be

Discharged.

(a) 4 Co. 32.

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The exception in 12 G. 3. c. 61. s. 11. of mills or other places then used for making gunpowder, &c. does not apply to the limits first mentioned in that clause, but only "to the other part of *Great Britain*" not within those limits; and therefore an information charging the keeping more than the allowed quantity of gunpowder within the specified limits, need not negative this exception.

THE defendant was convicted before two justices of the county of *Devon* on the stat. 12 G. 3. c. 61. s. 11. (a) for having in his possession more gunpowder than was allowed to be kept by law. The conviction was dated on the 24th *April*, 1817, and the information stated that within fourteen days last past, to wit, on the 17th day of *March* instant, one *Richard Matters*, master of a certain boat or vessel then lying on the water within a certain part of *Great Britain*, to wit, in the port of *Plymouth*, in the county aforesaid, (not being then a

(a) 12 G. 3. c. 61. s. 11. No persons shall have or keep, at any one time, being dealers in gunpowder, more than two hundred pounds of gunpowder; and not being such, more than fifty pounds of gunpowder, in any house, mill, magazine, storehouse, warehouse, shop, cellar, yard, wharf, or other building or place occupied by the same person or persons, (all buildings and places adjoining to each other, and occupied together, being to be deemed one house or place within this act); or on any river or other water, (except in carriages loading or unloading or passing on the land, or in ships' boats or vessels loading or unloading or passing on any river or other water, or detained there by the tide or bad weather,) within the following limits; that is to say, within the cities of *London* or *Westminster*, or within three miles of either of them, or within any city, borough, or market-town of *Great Britain*, or one mile of the same, or within two miles of any palace or house of residence of his majesty, or within two miles of any gunpowder magazine belonging to his majesty, his heirs or successors, or within half a mile of any parish church, or in any other part of *Great Britain*, (except in mills or other places which, at the commencement of this act, shall be used for the making of gunpowder, and the magazines, storehouses, and offices thereto adjoining and belonging, and in the places where it shall be lawful to make gunpowder, or to keep greater or unlimited quantities of gunpowder by force of the provisions hereinafter contained,) on pain of forfeiting all the gunpowder beyond the quantity hereby allowed to be kept, and the barrels in which such gunpowder shall be, and also two shillings for every pound of gunpowder beyond such allowed quantity.

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dealer in gunpowder,) did have and keep at one time, on board the said boat or vessel then lying on the water, within a certain part of *Great Britain*, to wit, in the port of *Plymouth*, in the county aforesaid, more than fifty pounds weight of gunpowder allowed by law to be kept, (to wit, twenty half barrels, containing nine hundred pounds weight of gunpowder and upwards,) the said boat or vessel in which the said last-mentioned gunpowder was, not being then and there loading and unloading, or passing on any river or other water, or being detained by the tide or bad weather, the said boat or vessel then and there lying on the water aforesaid, within the following limits; that is to say, within one mile of the borough and market-town of *Plymouth*, in the county aforesaid, and within two miles of a gunpowder magazine belonging to his present majesty, and within half a mile of a parish church, (the place where the said boat or vessel was then and there lying not being then a place where it was lawful to keep greater or unlimited quantities of gunpowder, by force of the statute passed in the 12th year of the reign of his present majesty King *George the Third*, entitled “An act to regulate the making, keeping, and carriage of gunpowder within *Great Britain*, and to repeal the laws heretofore made for any of those purposes,”) against the form of the statute in such case made and provided, whereby and by force of the said statute the said *Richard Matters* hath forfeited all the said gunpowder beyond the quantity allowed by law to be kept, and the barrels in which such last-mentioned gunpowder was, on the said seventh of *March* instant, and hath also forfeited two shillings for every pound weight of the said gunpowder beyond the quantity allowed by law as

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aforesaid, one moiety of which penalties is to be paid to his present majesty, his heirs or successors, and the other moiety thereof to be paid to the informer. The conviction then proceeded to set out the summons, the appearance and plea of the defendant, the examination of the witnesses, and the adjudication of the justices by which the gunpowder was condemned, and the penalty imposed. The conviction having been removed into this court by certiorari, *Bayly*, in *Michaelmas* term last, obtained a rule nisi to quash it, and the case was in this term argued by

Bayly, against the conviction. The exception (being incorporated in the enacting clause of the statute, which both creates the offence, and gives the penalty,) should have been negatived in the information, *Spiers v. Parker*. (a) One of the exceptions here is "mills or other places which at the commencement of the act were used for the making of gunpowder," &c. The information does not negative this exception; and the boat may either have contained a mill, or have been in a basin within the precincts of a mill or other place for making gunpowder. Suppose in this case that there had been a mill under which the water flowed, and this boat had been moored beneath the mill, then every thing stated in the information would be true, and yet it might still come within the exception; and this is by no means an unlikely supposition, for in manufactories adjoining canals and navigable rivers, there frequently are such places for boats.

(a) 1 T. R. 142.

E. Lewis,

E. Lawes, contra. The enacting clause creates two distinct offences; first, it is made an offence "for any person not being a dealer in gunpowder to keep more than fifty pounds in any house, &c. or on any river or water within a mile of a market town, or two miles of any magazine belonging to his majesty, or half a mile of any parish church." To this the exception as to mills does not apply. The act then goes on to state, "or in any other part of *Great Britain*, (except in mills, &c.)" and thus creates a second offence, viz. the keeping more than the allowed quantity out of the limits described in the first part of the clause, except in mills, &c.; but this latter exception does not in any respect add to, alter, or qualify the offence described in the first part of the clause, and therefore is not applicable to the charge in the information. For the gunpowder here is distinctly stated to have been kept within the limits specified in the first part of the section, and all the exceptions applicable to that offence are stated in the information; and the exception relating to mills not being applicable to this offence it was wholly unnecessary to take any notice of it.

Cur. adv. vult.

Lord ELLENBOROUGH C. J. now delivered the judgment of the Court.

This was a conviction under the gunpowder act, 12 G. 3. c. 61. s. 11., which reduces into one, and repeals all former acts relating to the making, keeping, and carrying of gunpowder. The legality of this conviction was argued before us on a former day in this term, and the only doubt which the Court entertained upon it was, whether it was necessary for the informant in his information to have negatived that the gunpowder

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sought thereby to be condemned as forfeited was kept "in any mills or other places which at the commencement of that act were used for the making of gunpowder," &c. The act first prohibits the keeping of gunpowder beyond certain specified quantities in certain specified places within which the gunpowder in question (which is the object of the information) is stated to have been kept: it then proceeds to prohibit the keeping of gunpowder in any other part of *Great Britain*, except in mills or other places, which at the commencement of that act were used for the making of gunpowder, &c. Now the gunpowder in question being expressly stated to have been kept within the prohibited limits first mentioned need not be stated not to be within the exception applied to the allowed limits secondly mentioned. The exception relates to a new subject, and need not be negatived, unless the gunpowder in question otherwise fell within the allowance given by the latter branch of the section to any *other part of Great Britain*, which it does not, being already comprehended within a particular part of *Great Britain* to which a prohibition is specifically annexed: the negativing this *exception* would therefore in this case have been impertinent; and as it relates only to *another part of Great Britain*, within which the gunpowder in question was not kept, would have been so far repugnant and contradictory. The information was therefore not liable to any objection on this ground.

Rule discharged.

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**WARD, Assignee of COTTEL, a Bankrupt,
against ABRAHAMS.**

*Tuesday,
Feb. 10th.*

ACTION by the plaintiff, as assignee of a bankrupt, for goods sold, &c. Plea, general issue. Plaintiff at the trial obtained a verdict for 3*l.* 12*s.* The defendant resided in *London*, and previous to the trial had given notice under 49 *Geo.* 3. c. 121. s. 10. of his intention to dispute the petitioning creditor's debt and act of bankruptcy. A rule nisi having been obtained on a former day in this term for leave to enter a suggestion on the roll in order to deprive plaintiff of his costs under 39 and 40 *Geo.* 3. c. 104.

The stat. 39 & 40 *G.* 3. c. 104. extends to assignees of a bankrupt; and therefore where a plaintiff, as assignee, recovered less than 5*l.*, the Court ordered a suggestion to be entered on the record to deprive the plaintiff of costs; but defendant having given notice of his intention to dispute the petitioning creditor's debt, &c. (which was proved at the trial,) it was holden that the plaintiff was entitled to the costs thereby occasioned; and the Court ordered the suggestion to be entered accordingly.

Marryat and *Campbell* now shewed cause. This statute applies only to those cases where the debt (which is the subject of inquiry) does not exceed 5*l.*, and where the parties do not sue in a representative character. But here the plaintiff does sue in that character; and the defendant having given notice of his intention to dispute the petitioning creditor's debt, &c. and act of bankruptcy, the inquiry would be as to a debt of 100*l.*; and secondly, as to the validity of the act of bankruptcy, which frequently is a question of much nicety. It clearly was not the intention of the legislature to give a jurisdiction upon such subjects to these inferior courts. At all events, the plaintiff ought not to be deprived of the costs occasioned by the proof of the petitioning creditor's debt and act of bankruptcy. That proof was rendered necessary by the notice given by the defendant, and the 49 *Geo.* 3. c. 121. s. 10. expressly provides,

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that "if the matter disputed shall be satisfactorily proved, that the assignees shall be entitled to the costs occasioned by such notice, even though the plaintiff be nonsuited, or there be a verdict for the defendant." The petitioning creditor's debt and act of bankruptcy were proved in this case; the plaintiff cannot therefore by the 39 and 40 Geo. 3. c. 104. be deprived of costs expressly given by a statute subsequently enacted. If, therefore, a suggestion be entered at all, it must be specially framed so as not to deprive the plaintiff of those costs.

Gurney and F. Pollock, contra. The case of *Wase, Administrator, v. Wyburd (a)*, is an authority to shew that this statute will extend to personal representatives, and there being no express exception applying to the case of an assignee of a bankrupt, the present case falls equally within its operation; the statute deprives plaintiffs of all costs where the sum recovered is less than 5*l.*, and before the 49 G. 3. c. 121. s. 10. the plaintiff would be bound without any notice to prove the act of bankruptcy, and the petitioning creditor's debt, and still if he recovered less than 5*l.* he would lose the costs occasioned by such proof. And the act of the defendant in giving this notice cannot give the plaintiff a title to costs of which he is deprived by the express provisions of an act of parliament.

Lord ELLENBOROUGH C. J. In the case of *Keay and Another, Assignees of Taylor, v. Rigg (b)*, the Court of Common Pleas allowed a suggestion to be

(a) *Dwgl.* 246.(b) 1 *Bos. & Pull.* 11.

entered under another act of parliament conferring a similar jurisdiction; and Lord Chief Justice *Eyre* says, that "although it might have been prudent for the legislature to have made such an exemption, yet as a general jurisdiction was given the trial of bankruptcy was incidental to it." This act, therefore, having given a general jurisdiction, and there being no express exception for the case of bankruptcy, the defendant is certainly entitled to enter a suggestion, but inasmuch as the proof of the petitioning creditor's debt was rendered necessary by the act of the defendant, the suggestion should be so entered, that the plaintiff may not be deprived of the costs thereby occasioned, but only of those costs which would have been incurred had no notice been given.

Rule absolute upon those terms.

Ex parte PILTON.

Tuesday,
Feb. 10th.

JAMES PILTON, in 1812, purchased of *Richard Platt* the lease of a dwelling-house and premises situate at No. 20. in *New Bond-street*, for the term of twelve years, at the rent of 300*l.*, for which, with the fixtures, he paid 525*l.* In 1814 he became a bankrupt, and his assignees declined taking to the lease in question. In *June* last *Platt* levied a distress for rent, and took *Pilton's* goods upon the premises. And afterwards,

Where a tenant ceased to reside on the premises for several months, and left them without any furniture, or sufficient other property to answer the year's rent: Held that the landlord might properly proceed under

11 G. 2. c. 19. s. 16. to recover the possession, although he knew where the tenant then was, and although the justices found a servant of the tenant on the premises when they first went to view the same.

Held also, that it is not necessary to state, in the record of the magistrate's proceedings, that the landlord had a right of re-entry, although such a right must exist in order to entitle the party to proceed under this statute.

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Pilton having in *June* last ceased to reside on the premises, *Platt*, on the 5th of *December* last, proceeded under the powers given by 11 G. 2. c. 19. s. 16. to recover the possession.

Chitty, on a former day in this term, had, under the 17th sect. of the act, obtained a rule to shew cause why the possession of the premises should not be restored to *Pilton*, and why *Platt* should not pay the expences and costs incurred, and the costs of the application. And the Court then ordered that on shewing cause, the record and other proceedings, by means of which *Platt* had obtained the possession, should be produced. The affidavits, on which the rule was obtained, stated that *Pilton* was at the time endeavouring to dispose of the lease, and that *Platt* knew where he was to be found during all the time; that when the justices came the first time, one of the deponents, *Middleship*, was there, as *Pilton's* servant, ready to shew the premises to any person who might wish to see them; that a *French* stove and the royal coat of arms, the property of *Pilton*, which had cost him 150*l.*, were in the house, but that there was no other article of furniture whatsoever on the premises at the time, nor had there been any since the distress levied in *June* last. When the justices came the second time, there were two persons painting the house for him. The record, on being produced, followed the precedent in *Burn's Justice*, vol. 1. p. 791.

Gaselee shewed cause. It is quite obvious, that in this case the premises were deserted within the meaning of 11 G. 2. c. 19. s. 16. *Pilton* had ceased to reside altogether in the house. There was no furniture or
any

any thing valuable, except the articles mentioned in the affidavits, which were of little or no value compared with the amount of the rent which was then due. And as to the possession by the servants, as it is called, that was merely colourable; and the painting, when the justices came the second time, is of no importance at all. For if the premises were deserted the first time, then, unless the rent be paid when they come the second time, they are to deliver possession. Then it is said, there is a formal objection to this record; viz. that it does not state a right of re-entry on the part of the lessor. That is not necessary: in *Woodfall's Landlord and Tenant*, 430., Lord *Kenyon* only lays it down that it is necessary there should, in fact, exist such a right which, as appears from the affidavits, does exist here. And the justices have in this case properly followed the precedent laid down in *Burn's Justice*.

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Chitty, contra, contended that the act only applied to cases where the tenant ran away altogether, and could not be found. Here *Platt* knew, at the time, where he was, and might have made an application to him for the rent. The premises were not wholly deserted; suppose a person leaves his house, and goes out of town for a few weeks, is that a desertion? Here, there was property left on the premises; there was a *French* stove, and his majesty's coat of arms, which, together, were of the value of 150*l*. And *Pilton* leaves his servant upon the premises, ready to shew them to any one who came; and he was, in fact, there when the justices came: the second time they came there were two there; and it is sworn, that then they were employed in painting the premises for him. As to the other point, respecting

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specting the right of re-entry, that should be stated on the record; for, unless there be that right, there cannot be a right to obtain possession of the premises in this mode. It should, therefore, be stated on the face of the proceedings, in order that it may clearly appear that the justices had jurisdiction.

LORD ELLENBOROUGH C. J. The act 11 G. 2. directs the justices to proceed upon view of the premises. If they go there and find no one in possession of them, and no sufficient distress upon them, they are then to consider them as deserted within the act, and affix the proper notices there. Now what are the facts here? *Pilton* has left his house, having been a bankrupt, and having no furniture left. He had ceased for a long time to live there, or to carry on his business; so that I can hardly suggest a stronger case of desertion. When the justices went on the first occasion they found, it is true, a person on the premises, but he was not there for the purpose of taking care of the premises; he did not sleep there; and he does not even state in his affidavit that he ever was there except when the justices came. The possession, as by him, is therefore obviously colourable. As to the two persons being there the second time the justices came, it is wholly immaterial, for it is not pretended that there was any one there who appeared and paid the rent in arrear, as is required by the statute. There is therefore no objection in substance to the proceeding of the magistrates. Nor is there any defect in form, for the record need not state the power of re-entry. The 16th clause says nothing about such a power, and the record has correctly followed the words used in that part of the act. It is true

true there must be in fact such a power, according to the case cited, as determined by Lord *Kenyon*. But that power does appear by the affidavits to exist in this case. The rule must therefore be discharged.

Rule discharged.

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The KING against The Justices of ESSEX.

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JESSOPP had obtained a rule nisi for a mandamus to the justices of *Essex*, to cause continuances to be entered, upon the appeal of *William Dyer*, against the inclosure, by virtue of an inquisition taken upon a writ of ad quod damnum, of a certain road therein described. At the *Essex* midsummer sessions, 1817, *Robert Wilson*, Esquire, was convicted on an indictment preferred by Mr. *Dyer* for erecting and continuing a wall upon a part of the public highway, and the judgment was respited till the next sessions. On the 1st of October following Mr. *Wilson* sued out a writ of ad quod damnum, and the inquisition was taken on the 9th October; by which it was found "that it would not be to the damage of our sovereign lord the king, or of any other, if our said sovereign lord the king should grant to *Robert Wilson* of *Woodhouse*, in the parish of *Eastham*, in the county of *Essex*, Esquire, a licence to inclose and shut up part of a certain road," &c., being that part of the road built upon by Mr. *Wilson*. At the *Michaelmas* sessions he tendered the writ, with the inquisition thereon taken, in bar of the judgment: the Court, however, rejected the application, and he was fined 1s.; and judgment of prostration was given. It was then moved on his behalf to file the said writ of inquisition with the sheriff's

In an appeal against an inclosure of a highway, by virtue of a writ of ad quod damnum, the notices required by the 55 G. 3. c. 68. must be given, and a notice to the party interested is not alone sufficient.

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sheriff's return thereof; which motion being granted, an appeal against the said writ and inquisition was immediately entered by Mr. *Dyer*, the hearing of which was respite until the following *Epiphany* sessions, without any objection on the part of Mr. *Wilson* that such appeal was irregular. More than ten days before the *Epiphany* sessions the appellant gave notice to Mr. *Wilson* of his intention to try the appeal at those sessions; but no notice of such appeal was given to the surveyor of the highways of the parish in which the highway in question was situated, nor was any such notice affixed to the door of the church or chapel of the parish. When the appeal was called on, the objection being taken that the notices required by the 55 Geo. 3. c. 68. s. 3. had not been given, the justices at the quarter sessions dismissed the appeal.

Walford and *Brodrick* now shewed cause. The question is, whether the appellant, who it is admitted had not given the notices required by 55 G. 3. c. 68. s. 3., was entitled to be heard. All the statutes relating to this subject, which precede the 55 G. 3. c. 68. have been repealed. The 8 and 9 W. 3. c. 16. which first allowed an appeal to the sessions, to any person aggrieved by the inclosure of any common highway after a writ of *ad quod damnum*, was repealed by the 7 G. 3. c. 42. s. 57. That statute was itself repealed (except so much thereof as repeals the several acts and parts of acts therein mentioned) by 13 G. 3. c. 78. s. 84. And the appeal clause, namely, s. 19. of this latter act, was also repealed by 55 G. 3. c. 68. s. 1. The whole argument must therefore depend upon the construction of this last act. The words used in the third section,

section, after referring to the stopping up, &c. of highways, &c. by order of the magistrates, are, "it shall and may be lawful for any person or persons injured or aggrieved by any such order or proceeding, or by the inclosure of any road or highway, by virtue of any inclosure taken upon any writ of ad quod damnum, to make his or their complaint thereof, by appeal to the justices of the peace at the said quarter sessions, upon giving ten days' notice in writing of such appeal, to the surveyor of the highways of the parish, township, or place wherein such highway, &c. shall be situated; and also affixing such notice to the door of the church or chapel of such parish, &c.; and the said court of quarter sessions is hereby authorized and empowered to hear and finally determine such appeal."

No one who reads this section can doubt the intention of the legislature to grant an appeal to a party aggrieved, when any road is inclosed by virtue of a writ of ad quod damnum; and if an appeal is given, then, as the language plainly indicates, certain notices are required, for the notices are conditions annexed to the appeal, and it cannot be argued that in any case an appeal is allowed, but that the notices are not required. The question therefore is, whether this manifest intention of the legislature has been frustrated by any inaccurate expression in that section, that "any person or persons aggrieved" may "make his or their complaint by appeal to the justices of the peace at the said quarter sessions." The "said quarter sessions" refer to the quarter sessions in the latter part of the 2d section of the same act. That section, which relates exclusively to diverting, turning, and stopping up highways, &c. by orders of magistrates, after requiring the publications of certain

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certain notices in the several cases therein mentioned, states that the said several notices having been so published, the said order shall, at the quarter sessions, which shall be holden within the limit where the highway, &c. so diverted, turned, or stopped up shall lie, be returned to the clerk of the peace in open court, and lodged with him. The fair construction of the 3d section appears to be, that the words "said quarter sessions" there used refer to this sentence in the 2d section, namely, "the quarter sessions which shall be holden within the limit where the highway, &c. so diverted, turned, or stopped up shall lie;" and although there may be a trifling inaccuracy in the expressions, and the time at which the appeal shall be brought against an inclosure by virtue of a writ of ad quod damnum may not be distinctly pointed out, yet such inaccuracies ought not to defeat the declared object of the legislature, for the statute must be construed ita ut res magis valeat quam pereat. The argument on the other side is that according to the true construction of the two sections taken together the appeals under this act are confined to the stopping up, &c. of highways, &c. by orders of magistrates. Now the intent of the legislature, as plainly expressed in the first section of this statute, is "to give more public notice of *any order or proceeding* had for diverting, &c. and also to give greater facility of appeal to the quarter sessions." Yet according to the interpretation contended for, any person may stop up a road by proceedings on a writ of ad quod damnum, without giving any public notice, and without any appeal allowed to the quarter sessions. Either the 55 G. 3. c. 68. s. 3. gives an appeal in this case, or it does not: if it does, then the notices are required, but if not,

then the justices had no jurisdiction at all. For unless an authority is expressly conferred on them by statute, the sessions cannot take cognizance of any proceedings on a writ of ad quod damnum, which is an original writ, issuing out of the Court of Chancery, and returnable into that court. In either case, the justices have properly dismissed this appeal.

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Scarlett and *Jessopp* in support of the rule. There is considerable ambiguity in the construction of this clause. Perhaps, however, it may be best construed by referring to the previous statutes on the subject; as though they have all been repealed, still they may afford assistance in the interpretation of the present act. Now the 8 and 9 W. 3. c. 16., which originally gave the appeal to a writ of ad quod damnum, required no notice to be given at all. There was, however, without this, or any other statute, a notice necessary to be given to the party interested. If that be adopted as a guide, it may be concluded that in this statute, supposing nothing had been said about notice at all, then the notice to the party interested would be sufficient. And that notice has here been given. Now all that part of the third section of the 55 G. 3. c. 68. which speaks of notices, applies only to those cases where a road has been stopped up by order of two justices. For the appeal is given by that clause to the "said quarter sessions." The word "said" is a word of reference. Then to what does it refer? It refers to the quarter sessions mentioned in the second section, viz. the sessions held next after the expiration of four weeks after the publication of certain notices. Now these notices are only given when a road is stopped up

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by order of magistrates, and have no existence where a road is stopped up by a writ of *ad quod damnum*. Then if so, *reddendo singula singulis*, there is a general right of appeal given in the case of a writ of *ad quod damnum*, as in 8 and 9 *W. 3. c. 16.*, and a qualified right of appeal in the case of an order of magistrates. In the latter case the notices are required. In the former, a notice to the party interested is enough.

LORD ELLENBOROUGH C. J. I cannot engender or inoculate my mind with any doubt on this subject. The third clause of 55 *G. 3. c. 68.* specifically combines together the two cases of roads stopped up by order of magistrates, and by virtue of a writ of *ad quod damnum*, and requires in both cases the same notices to be given. The whole argument turns upon the use of the word "said" the meaning of which is plain enough. The "said quarter sessions" refer to the quarter sessions meeting at a particular place, and having jurisdiction within the limits where the highway stopped up may happen to lie. The other construction would in truth make an end of all the provisions of the act for the purpose of giving a supposed better effect to the word "said." The party in this case seems to me either to have been wholly ignorant of the existence of the 55 *G. 3. c. 68.* or to have acted in perfect contempt of its directions. That act, both in cases of orders of magistrates and writs of *ad quod damnum*, requires a notice to be given to the surveyor of the highways, and also one to be affixed on the church door: neither have been here done; and the sessions very properly therefore dismissed the appeal. There is no possible doubt in this case; and no perversion even of the plain words of this statute, that
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can support the present application. The rule must therefore be discharged, and with costs.

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BAYLEY J. I am of the same opinion. The words "said sessions" only refer to the sessions for the county in which the road stopped up is situate. It is indeed contended that these words, if at all applicable to an inclosure under a writ of ad quod damnum, would mean an impossible sessions, there being no sessions happening four weeks after the notices mentioned, because such notices are never given at all in that sort of proceeding. But this would prove too much. For, supposing it to be so, then an appeal against an inclosure under a writ of ad quod damnum is given to an impossible sessions; which is in fact saying this, that there is to be no appeal at all. If that were so, the only conclusion that would follow would be, that the Court below have most clearly come to a right determination. The rule must therefore be discharged with costs.

ABBOTT and HOLROYD Js. concurred.

Rule discharged with costs.

The KING against WILLIAM FLEET. (a/ Wednesday,
Feb. 11th.

SCARLETT, on a former day in this term, had obtained a rule nisi for leave to file a criminal information against the defendant, who was the printer and publisher of a newspaper called *The Brighton Herald*, for

The Court will grant a criminal information for publishing, in a newspaper, a statement of the evidence given before a

coroner's jury, accompanied with comments, although the statement be correct, and the party has no malicious motive in the publication.

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the publication of his minutes of the evidence taken before a coroner's inquest on a charge of murder, accompanied by comments on the facts which had occurred. It appeared from the affidavits that on the evening of the 5th *November* last there had been a riot at *Brighton*, and the high constable, Mr. *John Williams*, had thought proper, in order to put an end to it, to call for the assistance of the military. The riot act having been read, and the mob still continuing assembled, he ordered the soldiers to charge. In the charge, owing to the darkness of the night, a person of the name of *Rowles*, an assistant of the high constable, was killed by one of the soldiers, who mistook him for a rioter. In consequence of this event a coroner's jury were assembled, who, after two or three days' examination, brought in a verdict of wilful murder against *J. Williams*, the high constable, *James White*, one of his assistants, and the soldier *James Day*. During the investigation before the coroner, the defendant attended and took notes of all that passed, and before the jury had finished their labours published a statement of the evidence, accompanied with remarks tending to cast blame on the high constable and the other peace officers for imprudently, and, as he stated, unnecessarily calling out the military for the purpose of suppressing the tumult which had arisen. The following were some of these remarks: " It really seems extraordinary that a town, which above all others has been conspicuous for its order and tranquillity, and which moreover is so deeply interested in the maintenance of its pacific character, should all at once become the scene of tumult and alarm: that it should have been convulsed by the reading of the riot-act, by the calling out of the military, and

and by the shedding of innocent blood. All this at first view appears incredible, but a moment's reflection convinces us that it is but too true, and the question, was there an adequate cause? involuntarily escapes our lips." And in another part of the paper there were these words: "The conduct of the high constable, to say the least of it, was imprudent," &c. And "had the public peace been really endangered," &c. &c. In answer to this rule, the defendant stated in his affidavit, in most distinct terms, that he was not actuated by any malice or other improper motives in the publication of this evidence: that what he had published was a correct statement of that which had passed, with only this exception, that he had not published the whole, having suppressed many parts bearing strongly on the accused, but not any which made for them: that in the remarks accompanying such statement he had certainly, in the honest expression of his opinion, lamented that the high constable had acted imprudently; that these observations were founded on facts really existing, for that the whole of the civil power had not been called in when the soldiers were sent for; and that in the same paper there was this passage: "This evidence, in a compressed form, we lay before our readers; but we hold it to be our duty, at the same time, to caution them to peruse it rather to satisfy their curiosity than their judgment, and to exercise candour and forbearance towards those, whose zeal, in the performance of their public duty, may have involved them in the inquiry. With this warning against their entertaining any sort of prejudice, or illiberality, we proceed to the melancholy subject." There were also affidavits from several of the coroner's jury, who stated that they had

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not been at all affected or prejudiced by the defendant's publication, and that the whole of what was published actually did pass with the same exception as above stated by the defendant.

Marryatt and *Chitty* shewed cause. They contended that the defendant had completely answered the application on the ground of malice, and that it was quite clear he had no bad motives in the publication. The observations and comments made were of a temperate and moderate description, lamenting the unfortunate event, and expressly attributing it to accident. It is true they also attributed rashness and imprudence to the high constable, but they did not impute any crime or criminal intent to him. And from the circumstances of the case it is not very unfair to say, that his conduct does appear to have been not entirely free from imprudence; and the defendant's observations were, therefore, not without foundation. Then as to the *ex parte* publication of the evidence, that was an *ex parte* publication, favourable to the accused; for the defendant omitted facts making against them, and stated all the circumstances in their favour. This publication was not calculated to excite prejudice; but rather to assuage the irritated feelings of the public; and contained observations cautioning them against prejudging the case. There is, therefore, no sufficient criminality apparent here, so as to induce this Court to interpose their authority and grant a criminal information.

Scarlett, in support of the rule. The defendant has certainly purged himself of all bad motives; but still
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such publications as these must not be suffered. The time when they came out is material: it was during the sitting of the coroner's jury, and might influence their minds. Observations tending to criminate are not the less effective for being written with apparent temper and moderation. Here the defendant, in one part says, "The conduct of the high constable, to say the least of it, was imprudent." Now that implies something more than imprudence. Then, again, "Had the public peace been really endangered," obviously inferring that it had not been so.

He was then stopped by the Court.

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LORD ELLENBOROUGH C. J. The Court, on full consideration of the affidavits on both sides, cannot for a moment doubt what their duty is on the present occasion. This publication contains a comment on the conduct of the civil power at *Brighton*, as having occasioned great mischief. It represents the calling out of the military as unnecessary, and it contains an *ex parte* statement of the evidence that was given before the coroner. The rule, therefore, for a criminal information, must be made absolute; but there are undoubtedly circumstances of considerable mitigation stated in the defendant's affidavits in answer to this application. It will be, therefore, for the prosecutor to consider, whether it would not be better to let the case stop here, and whether, the rule being granted, he shall think it necessary to continue any further proceedings. But whatever may be his ultimate decision on this head, it is not for the Court to take that into their consideration. It is their bounden duty to grant the information against the defendant.

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BAYLEY J. I think that the Court is bound to make this rule absolute. Nothing can be more important to individuals than that their trials should take place without any prejudice in the minds of those who are ultimately to decide upon the facts in evidence. There are in this case two different publications, in the first of which the conduct of the unfortunate parties accused is represented in a statement of facts accompanied by comments that may influence the public mind. In the second an account is given of what took place on the inquest before the coroner. That is a matter of great criminality; for the inquest before the coroner leads to a second inquiry, in which the conduct of the accused is to be considered by persons who ought to have formed no previous judgment of their case. It is a statement of evidence taken wholly ex parte, and where there is no opportunity for cross-examination. A jury who are afterwards to sit upon the trial ought not to have ex parte accounts previously laid before them. They ought to decide solely upon the evidence which they hear on the trial. It is, therefore, highly criminal to publish, before such trial, an account of what has passed on the inquest before the coroner.

ABBOTT J. Every person who has attended to the operations of his own mind must have observed how difficult it is to overcome preconceived prejudices and opinions, and that more especially in matters of sentiment or passion. It is therefore most mischievous to the temperate administration of justice, that a person either during or before a judicial examination should publish a statement of facts which are to be made the subject of a subsequent trial, and it is still more mis-

chievous when that statement is accompanied with comments. It is impossible to say that much which exists in this case is not calculated to create a prejudice in the public mind. The calling out of the military is stated to have been an unnecessary and rash measure: it is said that without their assistance the civil power would have been sufficient: all this has a manifest tendency to cause the jury, who are to come afterwards to try the question, to come with their prejudices excited either on one side or the other. The Court, therefore, cannot discharge their duty without making the rule absolute. There are, certainly, circumstances of mitigation in the case; the Court however cannot take them into their consideration, but must leave them to that of the party who has applied for this information.

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HOLROYD J. I am of the same opinion. These publications have a tendency improperly to influence the public mind, and are most mischievous in their results. They are often made use of in the most unjustifiable manner, and produce very dangerous consequences. It is incumbent on the Court, therefore, to make this rule absolute.

Rule absolute. (a)

(a) See *R. v. Fisher*, 2 Campb. 563, and *Rex v. Lee*, 5 Esp. N. P. R. 123.

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Wednesday,
Feb. 11th.

ZACHARIAH, Executor of WILLIAM HILL, against
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Where plaintiff sued as executor, and was nonsuited, upon evidence being given at the trial that the supposed testator was still alive, the Court refused to allow costs to the defendant, it appearing from affidavits on both sides to be still at least doubtful whether the supposed testator were living or not.

ACTION brought by plaintiff to recover from defendant, a navy agent, money received by the latter on account of the supposed testator *W. Hill*. The defendant had in the first instance paid money into court, but in *June*, 1817, receiving information that the supposed testator was still living, he communicated the same to the plaintiff's attorney, and obtained a judge's order that the money should be repaid to him. The plaintiff, notwithstanding, proceeded in his action, and the cause being tried at the *Guildhall* sittings after *Trinity* term, a witness, who stated himself to be the brother of the supposed testator, swore that the latter was then living, and was expected shortly to return to this country from a *Greenland* voyage. Upon this evidence the plaintiff was nonsuited; and upon these facts, disclosed by affidavit, a rule nisi was obtained, calling upon the plaintiff to shew cause why the defendant should not have his costs allowed him.

And now, in answer to this application, the plaintiff in his affidavit stated that he became acquainted with *W. Hill* in 1809; that the latter, previous to his going to sea, had deposited with the plaintiff the will in question, by which he was appointed executor; that in 1813 he received from an officer of the *Grampus* information of the death of *W. Hill*, a carpenter, at *Barbadoes*, the said *W. Hill* the testator being a carpenter,

carpenter, and, as plaintiff believed, then on service on board the *Grampus*; that believing this information to be true, and having made several inquiries as to the fact of the said *W. Hill* being alive or not, and not having otherwise heard of him since 1810, he in consequence, in 1813, duly proved the will in the ecclesiastical court, and took out letters testamentary, which were still unrepealed; and that he now had no reason (except from the evidence given at the trial) to believe the said *W. Hill* to be living, but, on the contrary, verily believed that he was dead.

Topping and *Chitty* now shewed cause. Upon the defendant's affidavits alone it does not appear that the plaintiff knew, when he first brought the action, that the testator was alive, and although the information received by the defendant was communicated to the plaintiff, yet the latter was not bound to believe it, and he had a right to trust his own information rather than that of the defendant; and upon the affidavits produced on both sides it appears to be a matter of doubt whether *W. Hill* be now living or dead. Executors, generally speaking, are not liable to costs, and the only ground on which the Court would in this case order them to pay costs would be, that they had been guilty of an abuse of the process of the court, but then it should distinctly appear that they knew the supposed testator to be alive, and that knowing that fact, they sued in the character of executors, but that at least is doubtful, and the plaintiff now has sworn that he verily believes the supposed testator to have died in 1813. That the verdict of the jury is not conclusive upon this question, has been judicially determined. In *Trinity*

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10 *Jac. 1.* (a) an action of debt was brought by executors, defendant pleaded that plaintiffs were not executors, and that issue was found for defendant. The defendant applied for costs, but the same were denied by the whole Court, for the jury might find an untruth. So in an action of debt by the administrator of *Hale* (b); plea, that *Hale* made one *J. S.* his executor, who had administered and was living, and issue being joined, the plaintiff at the trial was nonsuited. Upon a motion on the part of the defendant for costs, it was held, that an administrator who has obtained letters of administration from the ordinary is not liable to costs, but it is otherwise of an executor de son tort, who sues in his own wrong, and that it was so adjudged in a former case of *Hayward v. Davies*. These authorities shew, that an executor to whom letters of administration have been granted is not in any case liable to costs; but where he sues as executor without being so constituted by the competent authority, he may be so liable: in this case, the plaintiff was duly appointed executor, and is not therefore liable to costs.

Marryat and *Lawes*, contra. The plaintiff has thought proper voluntarily to take upon himself a character to which, as it now appears, he had no title; and suing in a character which does not belong to him, he ought not to be in a better situation than another person. But at all events he ought to pay the costs of the trial, and of all the proceedings subsequent to the Judge's order: when the fact of the supposed testator

(a) *Brownlow*, 79.(b) *Litt.* 3.

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being still alive was communicated to his attorney, and at all events he must then have known that the probate was a nullity; notwithstanding which, he continued to sue as executor, when he must have been conscious that he had no title to that character. He has therefore been guilty of an abuse of the process of the Court. *Comber, Administrator, v. Hardcastle (a)*, is an express authority that in such a case the Court will compel an administrator to pay costs.

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LORD ELLENBOROUGH C. J. There is no reason to suppose that when the action was commenced the plaintiff had any ground to doubt the fact of *Hill's* death: he was constituted executor by the ecclesiastical court, and as such had all the privileges incident to that character. It is perfectly clear, that he then had a right to sue as executor; but in the course of the proceeding it is alleged by the defendant that the supposed testator is living; and it is contended, that after this information was communicated to the plaintiff he had no right any longer to sue in his character of executor. But I do not see why the plaintiff, who had once brought his action with reasonable ground for believing the death of the testator, should defer to the information of the other side rather than continue to believe his own: he might not choose, and certainly was not bound to believe the statement of the defendant. And besides, unless it were proved incontestably that the supposed testator was living, we cannot assent to this application, for it is possible that the witness might not speak the truth, and that at this very moment the tes-

(a) 3 *Bos. & Pull.* 115.

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tator may be dead, and then we might be giving costs against a man who might, after all, be an actual executor. We must lay our ground upon unquestionable facts, and we cannot say that the facts here are of that description.

Per Curiam,

Rule discharged.

Thursday,
Feb. 12th.

The KING against BOND.

The setting up of a private still without entry at the excise, or licence, is an offence subject to the penalty of 20*l.* only, and not 200*l.*; and, therefore, a conviction for such an offence in the latter penalty was quashed.

THE defendant was convicted before two justices of the peace of the county of *Middlesex*, on the statute 26 G. 3. c. 73. s. 53. in the penalty of 200*l.* The conviction was dated 18th *June*, 1817, and the information stated, that the defendant, within three months last past; that is to say, on the eleventh day of *June*, instant, being actually the occupier of a certain house, to wit, at, &c. did knowingly permit a private still to be set up and used in the said house, by a certain person, to the informant, at present unknown, for the making of worts, wash, and other liquor for distillation, and of low wines and spirits, without a due entry being previously made thereof at the proper office of excise, and without having taken out a legal licence for that purpose, to wit, at, &c., contrary to the statute, whereby the said *John Bond* has, for the said private still, forfeited the sum of 200*l.* The conviction then went on to set forth the summons and appearance of defendant, and the evidence on the part of the informant and defendant, and it concluded thus: "We do award and adjudge that the said *John Bond* has, for his said offence, mentioned in the said information, forfeited the sum of 200*l.*, the said penalty to go and be applied

applied as the law directs; that is to say, one moiety to our lord the king, and the other moiety to the informant. In witness whereof," &c.

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Tindal, having on a former day obtained a certiorari for removing the conviction into this court, now moved to quash it, on the ground that there was no such penalty as 200*l.* for an offence of this description. This was an offence created by 26 G. 3. c. 73. s. 53., which enacts (after describing it as stated in this information) that the person offending "shall be subject to the same pains and penalties as are by law directed to be inflicted on persons actually using such back or still." Now the penalty for using a back or still was imposed by 3 and 4 W. & M. c. 15. s. 1., by which it is enacted, that no common distiller shall set up or make use of any still without notice, (that is entry,) upon pain to forfeit 20*l.* for every still so used or set up. The conviction, therefore, is bad, the penalty being incorrectly stated.

Walton, contra, contended that there were several statutes applicable to this case, by which a penalty of 200*l.* was imposed. By the 19 G. 3. c. 50., the person in whose custody any private still is found is subjected to a penalty of 200*l.* Now the person found actually using the still must also be the person in whose custody it is found. The penalty of 200*l.* will therefore, by fair intendment, apply to this case. So again, by 23 G. 3. c. 70. s. 13., a similar penalty is imposed on the proprietor or person in whose custody such still may be found. The legislature, therefore, it is much more likely

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likely had these more modern penalties in their view in this section of 26 G. 3. than the obsolete penalty of an old and almost forgotten act of parliament. It is besides to be observed that in the 3 and 4 W. & M. the words "actually using" are not employed. It must in that case be made out by argument, shewing that the words there are tantamount to the words "actually using." And in the other acts referred to, the same argument will hold good.

Lord ELLENBOROUGH C. J. There is a very inconvenient practice prevailing, and most especially in revenue acts, of imposing penalties by reference, as is done in this case. It has crept in by degrees, but is, I am afraid, now become inveterate. It produces this great evil, that no one, whilst this mode is adopted, can know what forfeitures he is incurring for any particular offence. Here the 26 G. 3. c. 73. s. 13. refers to some former statute, imposing a penalty on persons actually using a back or still. Now, on examination, we do find one which imposes a penalty of 20*l.* on persons who set up or use a still. But we do not find any one which in terms imposes a penalty of 200*l.* Can we, then, infer that any such act has an existence? As to the antiquity of the statute imposing the smaller penalty, we have nothing to do with that. The legislature may, if they please, act upon it; but we must take the law as we find it, and cannot, without authority, elevate one penalty into another.

BAYLEY J. concurred.

ABBOTT J. It would be extremely wrong that a man should, by a long train of conclusions, be reasoned into a pe-

a penalty, when the express words of the act of parliament do not authorize it.

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HOLROYD J. concurred.

Conviction quashed.

JAMES BALL *against* JOHN SWAN.

ASSUMPSIT for goods sold, money paid, &c.

Plea, that action was commenced after the making of a certain act of parliament passed in the 51 G. 3.; and that it was by the said act, amongst other things enacted, that where the cause of action in any court shall not amount to the sum of 15*l.* (exclusive of such costs, charges, and expences as in the act mentioned) no special writ or writs, nor any process specially therein expressing the cause or causes of action, shall from and after the first day of *November*, 1811, in the same act mentioned, be sued forth or issued from any court, in order to compel any person or persons to appear thereon in such court. And that all proceedings and judgments that should from and after the said 1st day of *November* therein mentioned, be had on any such writ or process should be, and were thereby declared to be void and of no effect. The plea then stated, that the plaintiff brought and commenced this action against the defendant in this behalf, by a certain writ issued out of the palace court, against the defendant at the suit of the plaintiff, in a plea of trespass on the case commonly called a bailable writ, and which writ was marked or indorsed for bail for 60*l.* and upwards, by virtue of a certain affidavit of debt theretofore made and filed in the said last-mentioned court,

A bailable writ is not necessarily a special writ within the 51 G. 3. c. 124. and therefore a plea stating that plaintiff commenced his action by a bailable writ indorsed for bail for 60*l.*, by virtue of which defendant was arrested; and that plaintiff's then cause of action did not amount to 15*l.*, or to any sum for which defendant was liable to be arrested; was held bad on general demurrer for not shewing the writ to be a special writ.

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by one *P. D.* as the agent or clerk of plaintiff in that behalf, and by virtue of which writ, defendant was afterwards, to wit, on &c. by the said *P. D.* as the bailiff of plaintiff in that writ, arrested and imprisoned at the suit of plaintiff, and that the cause of action (if any) which plaintiff had at the time of the commencement of this suit against defendant, in respect of the supposed promises in the declaration above-mentioned, did not amount to the sum of 15*l.* or to any sum of money for which by law, defendant was then liable to be arrested at the suit of plaintiff, wherefore the said *John* in fact saith, that the said writ, and the said declaration are wholly void and of no effect, to wit, at &c. And this &c. Wherefore, &c. General demurrer and joinder.

Taddy was called upon to support the plea. It appears from the preamble of 51 G. 3. c. 124. that that act was meant not only to extend, but to make more effectual the provisions of 12 G. 1. and of the other statutes made in *pari materia*. By the practice which has obtained upon the 12 G. 1., the security given to the subject against frivolous and vexatious arrests, is narrowed to cases in which the plaintiff cannot make an affidavit of his debt, whereas the protection afforded by the subsequent act of the 51st of the king, rests not on the oath or conscience of the plaintiff, but upon the fact of 15*l.* being actually due, and if the debt does not amount to that sum, the proceedings are rendered void (that is voidable by plea) though not by motion after judgment obtained, which was the case in *Spink v. Hitchcock*. (a) In the present plea, it is expressly

(a) 7 Term. 415.

alleged,

alleged, and admitted by the demurrer, that the cause of action does not amount to 15*l.*, in which case the statute provides that "no *special writ*, nor any *procest*, specially therein expressing the cause of action shall be issued from any court, in order to *compel any person to appear thereon in such court*, and that all proceedings and judgments had on any such writ or process, should be wholly void," the words "*special writ*" means something different from the other words "*process* specially expressing the cause of action;" the latter words probably meant a special *capias*, but the former cannot mean an original writ, because that does not issue out of the court in which it compels appearance, but out of chancery, and therefore, does not come within the latter part of the description in the clause; therefore, "*special writ*" means such a writ as can be made the ground of an arrest. The statute is in favour of liberty, and is to be construed largely, and this construction gives the only effectual protection to the defendant, by making it the interest of the plaintiff, not to arrest unless he is sure that his cause of action amounts to more than 15*l.*

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The Court appeared to think, that the words "*special writ*" meant a writ wherein some special matter was alleged, but held, that the plea at all events was bad; as it did not aver that the writ which issued out of the palace court was a special writ, and gave

Judgment for the plaintiff.

E. Lawes was to have argued for the plaintiff.

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An author, whose works had been published more than twenty-eight years before the passing of the 54 G. 3. c. 156. is not entitled to the copy-right for life.

BROOKE against WILLIAM CLARKE and Others. (a)

FRANCIS HARGRAVE, Esq. who is now living, being the author of certain notes or annotations on Lord *Coke's* first institute or commentary upon *Littleton*, which notes or annotations were first published in nineteen numbers, thirteen numbers whereof were first published before the end of the year 1775, and the residue thereof before the end of the year 1783, did, on the 20th *November*, 1784, execute an assignment to the said defendants bearing date on that day, whereby for the valuable considerations therein-mentioned he did (as far as he lawfully could) assign to the said defendants all his right, title, claim, property, and interest whatsoever in and to the copy-right of and in the said notes or annotations, also such further property or interest therein, as he might thereafter become entitled to by virtue of the act of the 8th year of Queen *Anne*, or by any other law or usage whatsoever, and on the 12th day of *February*, 1817, the said *Francis Hargrave* executed another assignment to the said plaintiff bearing date on that day, whereby for the valuable considerations therein mentioned, he did (as far as he lawfully could) assign and make over unto the plaintiff all his copy-right in the said notes or annotations, to hold the same unto the plaintiff for the remainder of the life of him the said *Hargrave*. The question directed by the Lord Chancellor for the opinion of this Court was, whether the plaintiff, by virtue of the last-mentioned assignment, took any, and if any, what interest in the said notes or annotations.

(a) This case was argued on a former day in this term.

Denman

Denman for the plaintiff. The question depends on the statute 54 G. 3. c. 156., which, as appears from the preamble, was passed for the express purpose of extending the rights of authors. It recites the 8 *Anne*, c. 19. (which first gave to authors a copy-right for fourteen years) and the 41 G. 3. c. 107., which gave to authors living at the end of the first fourteen years a further right for a like term; and then it proceeds to state, "that it will afford further encouragement to literature if the duration of such copy-right were extended." The object of the legislature, therefore, was to extend the duration of the copy-right; and if in the subsequent clauses any words of doubtful import occur, they should be construed with reference to the general purpose thus expressly avowed by the legislature. The ninth section of the act, (which is applicable to this case), is free from any such ambiguity. It provides, "that if the author (who might under the former act have acquired a right for twenty-eight years) shall be living at the end of such twenty-eight years, after such first publication, he shall then have the copy-right for his life." The author in this case is living, and the twenty-eight years after the first publication have expired: he is therefore within the very words of the act, and thereby becomes entitled to the copy-right or his life; and the assignment to the plaintiffs is consequently valid. It may be argued, however, that the legislature contemplated the term then to expire, and not already expired; and the author's term having actually been exhausted, when this act passed, that this case is not within its meaning. But it must then be made out that the words "at the end of twenty-eight years" are expressive of the very moment of time at which they should expire. That would however be a

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very narrow construction of these words, and not warranted by the meaning generally given to them in common usage. The words "at the end of any term" mean after that term is expired. In stating that at the end of a king's reign such things were done, it would not signify that they were done at the moment he ceased to reign, but only after he had ceased to reign. So if a right of way were granted for a number of years over certain closes, and at the end of those years the right is to cease; it would mean, that after these years are expired the right was to cease. It therefore appears that these words are used, in the common intercourse of mankind, not to express a precise point of time, but the expiration of a period as a thing passed. Then if the words are capable of this sense (although they may admit also of the other construction), they should be construed in this case so as to effect the general purpose of the legislature, viz. the extension of the duration of the copy-right of authors. By this construction the right of the author living at the end of twenty-eight years, (expired at the time of passing this act,) will be extended: by the other construction his right will not be extended or enlarged; and the object of the legislature will therefore be defeated. By construing the words so as to give to the author the copy-right for his life, the Court will give full effect to the words of the ninth section, and will further the general intention of the legislature, viz. the encouragement of literature, by extending the rights of authors.

Richardson, contra. This act of parliament does not re-vest in an author a copy-right which, under the then existing laws, was spent and terminated; it only extends, but does not create a right. The language and mean-

ing of the statute is wholly prospective. The fourth section provides that from and after the passing of the act, the author of any book composed and not printed and published, or which shall hereafter be composed and be printed and published, *shall* have the copy-right for twenty-eight years, and if he be living *at* the end of that period, for the term of his life. This section, therefore, makes an alteration in the then law, by extending the author's copy-right first for twenty-eight years, and if he be living at the end of twenty-eight years, for his life. It however provides only as to future publications; for the work may be written either before or after the act, but unless it be *published after* the act, this clause does not attach; and it goes on to inflict very severe penalties upon persons printing the works of any authors without their consent. So far the statute had provided for the cases of authors who published after the passing of the act. It occurred, however, to the legislature that some provisions should be made for existing authors whose rights under former acts had not then expired but were concurrent, and the eighth and ninth sections provide for these cases: the eighth section recites, "That whereas it is reasonable that authors of books already published, and who are now living, should have the benefit of the *extension* of copy-right." This word *extension* is a term properly used for the purpose of enlarging or giving further duration to any existing right; but does not import the re-vesting of an expired right; that would not be an *extension* but a *re-creation*. The object, therefore, of the eighth section is, to extend to living writers the benefit of their *unexpired* rights, and therefore it only applies to cases where the first fourteen years had not expired. The object of this act is to give to authors an absolute right for twenty-eight

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eight years; and in pursuance of that intention it gives a continuing interest for fourteen years to those who should be living, and whose copy-right under former acts had not expired; the words following the recital in that section are, "Be it further enacted, That if the author of any book which shall not have been published fourteen years at the time of passing this act, shall be then living; and if such author shall afterwards die before the expiration of the fourteen years, then the personal representative shall have the copyright for the further term of fourteen years, provided that nothing in the act shall affect any right of the assignee, to sell any of the books of the author printed within the first fourteen years;" the eighth and ninth sections both contemplate the case of living authors; the eighth, where the first fourteen years have not expired, and the ninth, where they have; the ninth section applies to the case where the author is living at the end of the first fourteen years, but before the expiration of the second fourteen years; these are the only two cases in which, before the passing of this act, an author could have any right capable of extension; and this statute does not create a new right not already existing, but only extends an existing right; the ninth section goes on "And be it *also* further enacted, (*i. e.* upon the same recital as that which precedes the eighth section) That if the author of any book already published, *shall* be living at the end of twenty-eight years after such publication, he shall have the copy-right for his life:" the words "*shall* be living" are prospective. The legislature does not suppose the time to have been already expired, but it contemplates a further extension of time then *unexpired*; the language is prospective in its terms, and the sense requires that

it should be so. For, taking the two sections together, it appears clearly that the legislature intended only to extend the already existing right of authors, and not to re-create a right then expired. This is perfectly consistent with the meaning of the word *shall*, and also with the meaning of the words *at the end of twenty-eight years*. The word, at the expiration of a term, means immediately after. Thus, if speaking of a reversioner, who is to come into possession at the expiration of the term, that could not be said to mean after the expiration of the term and at any future period: for the reversion attaches at the expiration of the term. But, admitting that the words are capable of either sense, they must be construed so as to give effect to the other words used in these two sections; and particularly with reference to the word "*shall*," which is prospective in its meaning; and the word *extension*, which imports the enlargement of an existing thing, and not a creation. The contrary construction would indeed produce an inconvenience and injustice, which could not be intended by the legislature; for, at the time of passing this act of parliament, the author's right having become extinguished, it was competent to any person to publish the work in question; and such publications may have actually taken place at a great expence to the individual; yet according to the construction contended for, if the author's right was re-vested, the innocent publisher might have his work taken from him, and would be subject to the penalties imposed by this act: so that an individual would be guilty of an offence, and subject to a penalty for exercising his legal right. The legislature could not have intended to produce so much public inconvenience to benefit a small, though highly meritorious class of individuals;
and

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and that cannot be the true construction of the act of parliament, from which such a consequence would follow. Looking, therefore, to the language of the section itself, and the general intention to be collected from the several clauses, as well as the great inconvenience that would follow if the opposite construction were to prevail; it does clearly seem that the intention of the act will be best effected by confining its operation to those authors who, at the time of passing the act of parliament, had existing rights; or, in other words, to those whose twenty-eight years had not then elapsed.

Denman, in reply. The word *extension* does occur in the eighth section, but not in the ninth: it is there studiously left out; and the benefit conferred by that section need not, therefore, come within the meaning of the term *extension*; and there is no expression that connects the two clauses, so as to make that word applicable to the ninth. [*Abbott J.* Will you mention any words in the *English* language more appropriate or apposite to connect one section with another than the words, "Be it also further enacted?"] They are separate clauses, and are not necessarily connected; and the ninth section does not say that the author's right shall be extended; but, generally, that, if living, he shall have the copy-right for his life: an extension of a right is given by one clause, and a right generally conferred by the other. With respect to the inconvenience which it is said will result from this construction of the act; it is not true that an innocent publisher would be subjected to the penalties inflicted by the fourth section; for those penalties only attach on offences comprised in that section. [*Bayley J.* Is not a man penally affected who has legally vested his money in

in a printed book, and is afterwards prevented from selling it?] The act could not be meant to operate as an *ex post facto* law in a case where a party had exercised rights vested in the public. Certainly no right actually vested in and exercised by the public was intended to be divested. If such rights had indeed been exercised, the case might have been very different as to the parties so exercising them; but the fact is otherwise; and therefore that question is immaterial. And that being so, then the case comes within the very words of the ninth section, and is embraced within the general object the legislature had in view in passing the act of parliament, viz. the extension of the copy-right of authors.

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LORD ELLENBOROUGH C. J. The word *extension* imports the continuance of an existing thing, and must have its full effect given to it where it occurs. It is expressly used in the recital of the eighth section, which is connected with the ninth, by the subject-matter as well as by the words "Be it also further enacted," and it seems to me, that predicating the purpose to be to benefit the author by the *extension* of his rights, is adopting a very different idea, from recreating an expired right. The word *extension* is too strong for me to grapple with; and if the Court were to get rid of its operation, a great public injury would be effected, by calling back a right that, by lapse of time, had become extinct. We shall certify our opinion to the Court of Chancery.

ABBOTT J. It is admitted that if the public had exercised their rights, by publishing the work before the act passed, that the author could not interfere with the parties who had so exercised the right: and there

are

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are no words in the act of parliament which admit of one construction where the public have exercised the privileges which have devolved upon them by the lapse of twenty-eight years, and another construction where they have not exercised that privilege. The act makes no distinction between these two cases.

Cur. adv. vult.

The following certificate was sent :

WE have heard this case argued by counsel, and have considered it, and are of opinion that the plaintiff, by virtue of the said last-mentioned assignment, did not take any interest in the said Notes or Annotations.

ELLENBOROUGH.

J. BAYLEY.

C. ABBOTT.

G. S. HOLROYD.

END OF HILARY TERM.

C A S E S

ARGUED AND DETERMINED

1818.

IN THE

Court of KING's BENCH,

IN

Easter Term,

In the Fifty-eighth Year of the Reign of GEORGE III.

ASHFORD v. THORNTON.

CLARKE, on the first day of last *Michaelmas* term, moved that the sheriff of the county of *Warwick* be called in to make a return to a writ of *Habeas Corpus*.

William Ashford was called, and answering to his name took his place.

The sheriff appeared with *Abraham Thornton* his prisoner, and first delivered in the writ of *Habeas Corpus* and the return thereto: which were read by *Mr.*

In an appeal of death, appellee waged his battle. Held that the counterplea to oust him of this mode of trial must disclose such violent and strong presumptions of guilt, as to leave no possible doubt in the minds of the Court. And therefore a counterplea

which only stated strong circumstances of suspicion, was held to be insufficient. Held also that the appellee may reply fresh matter tending to shew his innocence, as for instance an alibi, and his former acquittal of the same offence on an indictment. But quære where the counterplea is per se insufficient, or where the replication is a good answer to it, whether the Court should give judgment that the appellee be allowed his wager of battle, or that he go without day.

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Barlow. The writ was in the usual form, and returnable on the morrow of *All Souls*.

The return stated, that before the said writ came to the hands of the sheriff, viz. on the 10th *October* in the 57th year of His Majesty's reign, *Abraham Thornton* had been committed to his custody by virtue of His Majesty's writ of appeal:—

The writ of appeal and the return thereto were annexed to this return made to the writ of *Habeas Corpus*. They were as follows. *George* the Third by the grace of God, &c. To the sheriff of *Warwickshire* greeting. If *William Ashford* of the parish of *Flints* in the county of *Stafford*, labourer, who was the eldest brother, and is the heir of *Mary Ashford*, late of *Langley* in the parish of *Sutton Coldfield* in your county, spinster deceased, shall give you security to prosecute his suit, then we command you that you attach *Abraham Thornton* late of *Castle Bromwich* in the parish of *Aston* near *Birmingham* in your county, labourer, by his body, according to the law and custom of *England*, so that we may have him before us on the morrow of *All Souls*, wheresoever we shall then be in *England*, to answer to the aforesaid *William Ashford* of the death of the aforesaid *Mary*, heretofore his sister, and whose heir he is, whereof he appealeth him, and have you there this writ. Witness ourself at *Westminster* the 1st day of *October* in the 57th year of our reign.

The sheriff of *Warwick* returned as follows: By virtue of this writ to me directed (the within named *William Ashford* having found and given sufficient pledges to prosecute his within writ of appeal and his suit in that behalf, and which said pledges are *John Coleman* of *Langley Heath*, in the parish of *Sutton Coldfield* in my bailiwick,

bailiwick, yeoman, and *Charles Colman of Erdington* in the parish of *Aston* near *Birmingham* in my said bailiwick, labourer,) I have attached the within named *Abraham Thornton* whose body I have in his Majesty's gaol in and for the said county of *Warwick* under my custody, to answer the within named *William Ashford* of the death of the within named *Mary Ashford* whereof he appealeth him as within mentioned.

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Clarke then moved that the appellee be committed to the custody of the marshal of the marshalsea. — And he was so committed.

Clarke then moved that the appellant might count against the appellee, and that the appellee be placed at the bar for that purpose. On which, *Thornton*, who had before stood on the floor of the court, was placed at the bar, and the appellant then handed his count to *Mr. Le Blanc*, the proceedings being now on the civil side of the court. It was then read by *Mr. Le Blanc*.

In the King's Bench *Michaelmas* term, 58 G. 3. *Abraham Thornton* was attached to answer *W. Ashford*, who was the eldest brother, and is the heir of *Mary Ashford* deceased, of the death of the said *Mary Ashford*, and thereupon the said *W. Ashford* in his own proper person appealeth *Abraham Thornton*, &c. For that he the said *Abraham Thornton* not having the fear of God before his eyes, but being moved and seduced by the instigation of the Devil, on the 27th day of *May*, in the 57th year of the reign of our sovereign lord *George* the Third by the grace of God, &c. with force of arms at the parish of *Sutton Coldfield* in the county of *War-*

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wick, in and upon the said *Mary Ashford* spinster, in the peace of God and our said lord the king, then and there being feloniously, wilfully, and of his malice aforethought, did make an assault, and that the said *Abraham Thornton* then and there feloniously and wilfully, and of his malice aforethought, did take the said *Mary Ashford* into both his hands, and did then and there feloniously, wilfully, violently, and of his malice aforethought, cast, throw, and push the said *Mary Ashford* into a certain pit of water, wherein there was then a great quantity of water, situate in the parish of *Sutton Coldfield* aforesaid in the county aforesaid, by means of which said casting, throwing, and pushing of the said *Mary Ashford* into the pit of water aforesaid by the said *A. Thornton* in form aforesaid, she, the said *M. Ashford* in the pit of water aforesaid with the water aforesaid, was then and there choaked, suffocated, and drowned, of which said choking, suffocating, and drowning she, the said *M. Ashford*, then and there instantly died. And so the said *A. Thornton*, her the said *Mary Ashford* in manner and form aforesaid feloniously and wilfully, and of his malice aforethought, did kill and murder against the peace of our said lord the king his crown and dignity. And if the said *A. Thornton* will deny the felony and murder aforesaid, as aforesaid charged upon him, then the said *W. Ashford*, who was the eldest brother and is the heir of the said *Mary Ashford* deceased, is ready to prove the said felony and murder against him the said *A. Thornton* according as the Court here shall consider thereof, and hath found pledges to prosecute his appeal.

Witness

WILLIAM ASHFORD.

his x mark.

Clarke

Clarke then moved that the appellee be required to plead.

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Reader who, with *Reynolds* and *Tindal*, appeared for the appellee, applied for time. The Court by consent granted time till *Monday, Nov. 16.*

Reader then applied for copies of the original writ, the return thereto, and the count, which the Court refused, but desired *Mr. Barlow* to read over the two former, and *Mr. Le Blanc* to read over the latter, *slowly* in court, which was done.

Nov. 16. The appellee being brought into court and placed at the bar, and the appellant being also in court, the count was again read over to him, and he was called upon to plead. He pleaded as follows: "Not guilty; and I am ready to defend the same by my body." And thereupon taking his glove off, he threw it upon the floor of the court.

Clarke then applied to the Court for time.

LORD ELLENBOROUGH. Do you apply for time generally, or for time to counterplead?

Clarke stated that he applied for time to counterplead.

The Court then gave time till *Saturday, Nov. 21.* to counterplead; *Reader* for the appellee consenting to it.

Nov. 21. The parties appearing, the appellant delivered in his counterplea, which he verified by his affidavit, and the same was read by *Mr. Le Blanc.*

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In the King's Bench.

—
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Saturday next after eight days of *St. Martin*, in *Michaelmas* term, in the 58th year of King *Geo. 3.*

And the said *W. A.* saith, that the said *A. T.* ought not to be admitted to wage battle in this appeal with him the said *W. A.*, because he saith, that before and at the time of the issuing of the writ of appeal of him the said *W. A.* in this suit, there were, and still are, the violent and strong presumptions, and proofs following, that he the said *A. T.* was and is guilty of the felony and murder aforesaid, in the said count so charged and alleged against him the said *A. T.* as aforesaid, to wit, at, &c. (that is to say) that on the 27th day of *May*, in the 57th *G. 3.* about the hour of seven in the morning of the same day, the body of the said *Mary Ashford* in the said writ of appeal and count mentioned, was found dead in a pit of water situate in the parish of *Sutton Coldfield* aforesaid, in the county of *Warwick* aforesaid, and that the said body of the said *Mary Ashford* was then and there taken out of the said pit and examined in the presence of divers credible witnesses in this behalf. And the said *W. A.* further saith, that upon and from the said examination of the said body of the said *Mary Ashford* it then and there appeared and was manifest to the said witnesses, that she the said *Mary Ashford* had been and was recently alive, and that she the said *Mary Ashford* had come to her death by drowning, as in and by the said count is charged and alleged; and that recently before the death of her the said *Mary Ashford* some man had forcibly had carnal knowledge of the body of her the said *Mary Ashford*, and that up to the time of such carnal knowledge so had as aforesaid she the said *Mary Ashford* had been and was a virgin. And

that upon the said examination there also then and there appeared and were manifest upon each of the arms of her the said *Mary Ashford*, between the shoulder and the elbow of each of the said arms, the mark and impression of a human hand, the said marks and impressions then and there denoting and indicating that each of the arms of her the said *Mary Ashford* had been recently grasped and held with violence. And the said *W. A.* further saith, that on the said examination of the body of the said *Mary Ashford* there then and there appeared and were marks and stains of blood upon and about the thighs and private parts of the body of her the said *Mary Ashford*, and also upon the clothes and dress in which the body of the said *Mary Ashford* was clothed when the same was so taken out of the said pit as aforesaid; and that the front part of the shift wherein the body of the said *Mary Ashford* was then clothed was then and there rent and torn, to wit, at, &c. And the said *W. A.* further saith, that on the said 27th day of *May*, in the 57th year aforesaid, in the parish of *Sutton Coldfield* aforesaid, in the said county of *Warwick*, about the hour last aforesaid, upon certain grass then and there growing about the distance of forty yards from the said pit there was the mark and impression of a human figure, from which said mark and impression it then and there appeared and was manifest that a human body had been recently lying there with the arms and legs thereof extended, and that there was then and there blood upon the said grass near to the centre of the said mark and impression of such figure as aforesaid, and also a large quantity of blood upon the ground near to the lower extremity of the said mark and impression of the said figure; and that between the places where the said mark and impression of the said figure

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was and the said pit, divers other marks, spots, and vestiges of blood then and there appeared and were manifest upon and across a certain footpath there, and upon certain clover grass then and there growing, and being on one side of the said footpath and about a foot and a half from the side of the said footpath in a direction leading from the place where the said mark and impression of the said human figure was, towards and near to the said pit, and that the said lastmentioned marks, spots, and vestiges of blood upon the said clover grass then and there growing by the side of the said footpath as aforesaid were near enough to the said footpath to have fallen from a human body carried in the arms of a person passing along the said footpath from the place where the said mark and impression of the said human figure was, towards the said pit, and that there was not at the time when the said body of the said *Mary Ashford* was so found in the said pit as aforesaid any impression, mark or vestige on the said clover grass (whereon the said lastmentioned marks, spots, and vestiges of blood were by the side of the said footpath as aforesaid) of any footstep or of any person having walked or passed on or over the said clover grass there, and the said clover grass there was then covered with dew, and the same dew was not disturbed or brushed away otherwise than by the said blood so being thereon as aforesaid. And the said *W. A.* further saith that in the evening of the 26th *May* in the 57th year aforesaid, the said *Mary Ashford* was at a dance at the house of one *Daniel Clarke* in the parish of *Cudworth* in the said county of *Warwick*, and that the said *A. T.* was then there also; and that while the said *Mary Ashford* so was at the said house of the said *D. Clarke* (to wit) on, &c. at, &c., he the said *Abraham Thornton* said of
and

and concerning the said *Mary Ashford* in the presence and hearing of one *Joseph Cooke* then and there and still being a credible witness, but not in the hearing of the said *Mary Ashford*, in gross and obscene language to the effect following, (that is to say,) that he the said *A. T.* had had carnal knowledge of the sister of the said *M. Ashford* three times, and that he would have carnal knowledge of her the said *M. Ashford* or die by it. And the said *W. A.* further, saith that the said *M. Ashford* and the said *A. T.* danced together at the house of the said *D. Clarke* on the evening of the said 26th day of *May*, and that about 12 o'clock at night of the same 26th day of *May* at, &c., the said *Mary Ashford* and *A. T.* left the said house of the said *Daniel Clarke* and walked together towards *Erdington* in the parish of *Aston* near *Birmingham* in the said county of *Warwick*. And the said *W. A.* further saith that about 3 o'clock in the morning of the 27th day of *May*, the said *Mary Ashford* and *A. T.* were seen talking together at a certain stile near to a certain lane called *Bell Lane* leading towards *Erdington* aforesaid, to wit, at, &c. And the said *W. A.* further saith that about 4 o'clock of the same morning of the said 27th day of *May* in the 57th year aforesaid, the said *Mary Ashford* went to the house of a certain person, (to wit) one *Mary Butler* in *Erdington* aforesaid, at which said lastmentioned house she, the said *Mary Ashford*, had on the then preceding day left some wearing apparel, and that the said *M. Ashford* then and there remained in the said lastmentioned house about a quarter of an hour, and that during that time she, the said *M. Ashford*, then and there appeared in good health and in perfect composure of mind. And the said *W. A.* further saith that the

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said *Mary Ashford* at the end of the said lastmentioned time, to wit, on, &c. left the said lastmentioned house, to wit, at, &c. And the said *W. A.* further saith that very soon, (that is to say,) within the space of a quarter of an hour after the said *Mary Ashford* so left the said lastmentioned house as aforesaid, she the said *Mary Ashford* was seen (to wit) at, &c. walking alone in a direction leading from *Erdington* aforesaid towards *Langley* in the said parish of *Sutton Coldfield* in the said county of *Warwick*, which said *Langley* was then the place of residence of her, the said *Mary Ashford*. And the said *W. A.* further saith that before and on the said 27th day of *May* in the 57th year aforesaid there was a certain public foot way leading out of *Bell Lane* aforesaid across certain closes towards *Langley* aforesaid, to wit, at, &c. and that one of the said closes a short time before the said 27th day of *May* aforesaid in the 57th year aforesaid had been harrowed, and then was newly harrowed, and which said lastmentioned close was and is next adjoining to the close in which was and is situate the said pit wherein the body of the said *Mary Ashford* was found as aforesaid, to wit, at, &c. And the said *W. A.* further saith that on the 27th day of *May* in the morning of that day, to wit, at, &c. there appeared and were manifest in the said harrowed field in and upon the said newly harrowed ground there, the recent marks and impressions of the footsteps of the said *A. T.* and of the footsteps of the said *Mary Ashford*, the same having been then and there carefully examined and compared by divers credible witnesses, with the shoes worn by the said *A. T.* and the said *Mary Ashford* respectively on the morning of the same 27th day of *May*, and that it then and there appeared and was manifest from the said marks and

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impressions of the said footsteps to the said credible witnesses who then and there examined and compared them as aforesaid, that she, the said *Mary Ashford*, had run and endeavoured to escape from him the said *A. T.*, and that he, the said *A. T.* had run after and pursued her the said *Mary Ashford*, and had overtaken her in the said harrowed field, and it also then and there appeared and was manifest to the same credible witnesses from the said marks and impressions of the said footsteps, that from that part of the said harrowed field where he the said *A. T.*, had so overtaken the said *Mary Ashford* as aforesaid, they, the said *A. T.* and *Mary Ashford* had walked together in a direction leading towards the said pit where the body of the said *Mary Ashford* was so found as aforesaid and also towards the spot where the said mark and impression of a human figure appeared on the grass as aforesaid until the said marks and impressions of the said footsteps approached and came within the distance of about forty yards from the said pit at which said distance from the said pit the said marks and impressions of the said footsteps were lost and could no longer be traced by reason of the hardness of the ground there. And the said *W. A.* further says that there also then and there appeared and were manifest in the said harrowed field in and upon the said harrowed ground there, the recent marks and impressions of the footsteps of the said *A. T.*, from which said lastmentioned marks and impressions it then and there appeared and was manifest to the same lastmentioned credible witnesses who then and there carefully examined and compared the said lastmentioned footsteps with the shoes so worn by the said *A. T.* as aforesaid, that he, the said *A. T.* had then recently

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recently run by himself along the said harrowed field in a direction leading from the said pit, to wit, at, &c. And the said *W. A.* further says that no other marks or impressions of any footsteps of her the said *Mary Ashford* were then and there found or visible except as aforesaid. And the said *W. A.* further says that on the morning of the said 27th day of *May* in the 57th year aforesaid, to wit, at, &c. there was visible and manifest on certain grass then and there growing very near to the edge of the bank of the said pit, and near to that part of the said pit, in which the body of the said *Mary Ashford* was found drowned as aforesaid, the mark and impression of the shoe of a man's left foot. And the said *W. A.* saith that on the same morning the said *A. T.* had on and wore shoes made and fitted for his right and left feet respectively, to wit, at, &c. And the said *W. A.* further saith that on the morning of the said 27th day of *May* in the 57th year aforesaid, at, &c. the said *A. T.* was searched and stripped in the presence of divers credible witnesses, and that the shirt of the said *A. T.* and the inside of the breeches of the said *A. T.*, and which said shirt and breeches he, the said *A. T.*, then and there had on and wore were then and there marked and stained with blood, and that on the same being discovered to be so marked and stained with blood the said *A. T.* then and there declared that on the then preceding night he had carnal knowledge of the body of the said *Mary Ashford* by her own consent. And this he, the said *W. A.*, is ready to verify when, where, and in such manner as the Court here shall direct and award: wherefore he prays judgment; and that the said *A. T.* may not be admitted to wage battle in this appeal against him the said *W. A.*

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The Court, by consent, gave time to reply till the second day of *Hilary* term, on which day, the appellee put in his replication, which he also verified by his affidavit.

Saturday next after eight days of *Saint Hilary*, in *Hilary* term in the 58th year of the reign of King *George* the Third.

And the said *Abraham Thornton* saith, that he the said *A. T.* notwithstanding any thing by the said *W. A.* in the said counterplea alleged, ought to be admitted to wage battle in this appeal with him the said *W. A.* because protesting that the said counterplea is insufficient, and that he the said *A. T.* is not under any necessity or in anywise bound by the law of the land, to answer the same, nevertheless for replication to the said counterplea in this behalf, the said *A. T.* saith, that before and at the time of the issuing of the writ of appeal of him the said *W. A.* in this suit, there were, and still are the violent and strong presumptions and proofs following, that he the said *A. T.* was not and is not guilty of the felony and murder aforesaid, in the said writ of appeal and count charged and alleged against him, (that is to say) that at the time when the said *Mary Ashford* went to the house of the said *Mary Butler* in *Erdington* aforesaid in the morning of the said *Tuesday* the 27th day of *May* as in the counterplea of the said *W. A.* is above set forth, she the said *M. Ashford* went there alone, and unaccompanied by the said *A. T.*, and the said *A. T.* further says, that the said *Mary Ashford* left the house of the said *Mary Butler* at about one quarter of an hour past four of the clock on the said morning, alone, and unaccompanied by the said *A. T.*, and proceeded in a
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direction towards *Langley* aforesaid, to wit at, &c. And the said *A. T.* further says, that a short time after the said *Mary Ashford* had so left the house of the said *Mary Butler*, she was met at a short distance from the same, walking alone in a direction leading from *Erdington* aforesaid, towards *Langley* aforesaid, by one *Joseph Dawson*, who then and there saw her in *Bell Lane* in the said counterplea mentioned, and proceeding therein towards *Langley* aforesaid, he the said *A. T.* not being in company with the said *M. Ashford*, nor any where within sight, to wit, at, &c. And the said *A. T.* further says, that within a short time afterwards, that is to say, within the space of a quarter of an hour from the time she so left the house of the said *Mary Butler*, the said *Mary Ashford* was seen by one *Thomas Broadhurst* crossing the turnpike road leading from *London* to *Chester*, in that part of the same which passes across the *Bell Lane*, and that the said *Mary Ashford* continued the course along the said lane, called *Bell Lane*, towards *Langley* aforesaid, she the said *Mary Ashford* then also being alone, and unaccompanied by the said *A. T.* to wit, at, &c. And the said *A. T.* further saith, that at the said several places when the said *Mary Ashford* was so as aforesaid seen by the said *Joseph Dawson* and the said *Thomas Broadhurst*, the said road was broad and straight for a considerable distance, and that he the said *A. T.* might then and there have been seen at a considerable distance if he had been proceeding in the same direction with the said *Mary Ashford*, to wit, at, &c. And the said *A. T.* further says, that on the morning of the said *Thursday* the 27th day of *May* at half past four and not later than 25 minutes before five o'clock
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of the said morning, he the said *A. T.* was seen by divers credible witnesses, that is to say, by one *W. Jennings*, one *Martha Jennings*, one *Jane Heaton*, and one *John Holden*, the younger, being all of them persons with whom he the said *A. T.* had no previous connexion or any acquaintance, whilst he the said *A. T.* was walking along a certain lane leading from *Erdington* aforesaid, to *Castle Bromwich* aforesaid, close to the farm house of one *John Holden*, the elder, which was the direct way from *Erdington* aforesaid, towards the house of the said *A. T.*'s father, with whom he the said *A. T.* then resided, to wit at, &c. and that the said *A. T.* was then walking very slowly, leisurely, and composedly along the said lane, and did not appear to any of the said persons last mentioned, to be in any degree of confusion or disorder. And the said *A. T.* further saith, that when he had continued his course about a mile from the said farm house of the said *John Holden*, the elder, he was seen by one *John Haydon* still slowly walking in a certain foot-path in the same direction from *Erdington* aforesaid towards *Castle Bromwich* aforesaid, and that the time at which he was so seen by the said *John Haydon*, was about ten minutes before five o'clock of the same morning. And the said *A. T.* says, that he was very well acquainted with the said *John Haydon*, and that he then and there stopped and conversed with the said *John Haydon* for the space of a quarter of an hour, after which he the said *A. T.* parted from him and continued walking on towards the house of his the said *A. T.*'s father near *Castle Bromwich* aforesaid; and the said *A. T.* further saith, that one *John Woodcock* saw him the said *A. T.* and the said *John Haydon* so stopping and conversing together

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together as last aforesaid, to wit at, &c. And the said *A. T.* further saith, that he the said *A. T.* was afterwards seen by one *James White* in *Castle Bromwich* aforesaid, at about 25 minutes past five of the clock of the same morning, when he the said *A. T.* was still walking slowly and leisurely in a direction towards his father's house, which was about half a mile from *Castle Bromwich* aforesaid, to wit, at, &c. And the said *A. T.* further says, that the distance from the house of the said *Mary Butler* along the said lane called *Bell Lane*, and over and across the said harrowed field in the said counterplea mentioned to the pit of water wherein the body of the said *Mary Ashford* was found, is one mile two furlongs and thirty yards, and that the distance from the workhouse being the nearest point of the village of *Erdington* to the said farm house of the said *John Holden* the elder, along the said lane and footpath leading from *Erdington* aforesaid to *Castle Bromwich* aforesaid, is one mile three furlongs and sixty-two yards, and that the distance from the said pit of water round by *Erdington* aforesaid to the said house of the said *John Holden* the elder, is two miles and four furlongs at the least, to wit, at, &c. And the said *A. T.* further saith, that the most ready and accessible way from the said pit of water to the said farm house of the said *John Holden* the elder, and also the shortest way with the exception of that hereinafter next mentioned, and also the way which could be gone over in the shortest possible time, by any person travelling the same on foot, was and is the way following (that is to say) from the said pit of water across certain closes into a certain turnpike road, called the *Chester* road, at a part thereof near to the garden

garden wall of one *Mr. Hipkins*, and so across the said road into, over, and across certain other inclosures into and along a certain lane leading by the house of *Mr. Laugher*, and so along a certain other lane unto the said farm house of the said *John Holden* the elder, and that the distance of the said pit of water from the said last-mentioned farm house, measured in the direction of the said last mentioned way, is not less than one mile seven furlongs and one hundred and seventy yards, to wit, at, &c. And the said *A. T.* further saith, that the distance from the said pit of water in a straight line to the said farm house of the said *John Holden* the elder, is not less than one mile four furlongs and sixty yards, but the said *A. T.* saith, that there is no footpath or other way in the direction last mentioned, except for the distance of about one hundred yards, being from the bridge across the said canal to the said farm house, and that from the intersections of the hedges and fences of the several inclosures lying between the said pit of water and the said bridge, and the difficulties of the ground, it would require a longer time to arrive at the said farm house by the said last-mentioned course, than by taking the more circuitous and accessible course, secondly above pointed out, to wit, at &c. And the said *A. T.* further saith, that the clock of the house of the said *Mary Butler*, by which the time of the departure of the said *Mary Ashford* from the said last-mentioned house is fixed and ascertained, was on the morning of the said 27th day of *May*, and before any alteration was made in the time marked by the said clock, carefully compared by one *William Webster*, Esq. a person wholly unknown to the said *A. T.*, and one of the witnesses called by the pro-

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secutors upon the trial of the indictment hereinafter next mentioned, with the true time then kept at *Birmingham*, and that the clock at the farm house of the said *John Holden* the elder, by which the time of the arrival of the said *A. T.* close to that farm house is ascertained, was also on the morning of the 28th day of *May*, and before any alteration was made in the time marked by the same, carefully compared by one *William Twamley*, a person wholly unconnected with the said *A. T.*, with the same true time so kept at *Birmingham* as aforesaid, and that the several times hereinbefore stated, that is to say, the time of one quarter of an hour past four of the clock at which the said *Mary Ashford* left the house of the said *Mary Budler*, and the time of half an hour past four of the clock, or 25 minutes before five of the clock, at which the said *A. T.* was close to the farm house of the said *John Holden* the elder, and also the said several other times hereinbefore mentioned, are all corrected and reduced to the same measure of time, that is to say, the true time so kept at *Birmingham* on that day, and are hereinbefore stated accordingly, to wit, at, &c. And the said *A. T.* further saith, that upon his arrival at his father's house, near *Castle Bromwich* aforesaid, on the morning of the said 27th day of *May*, he changed his hat and coat which he had worn during the preceding night, and no other part of his wearing apparel, but that he still had on and wore the same shirt and breeches, and the same stockings and shoes, which he had worn during the preceding night, and he had on and wore the same respectively at the time he was apprehended upon the said charge of the said felony and murder, to wit, at, &c. And the said *A. T.* further saith, that

that on such his apprehension, upon the charge of having been guilty of the said felony and murder of the said *Mary Ashford* as aforesaid, he was taken before one *Wm. Bedford*, Esq. one of his Majesty's Justices of the peace for the county of *Warwick*, before whom the several witnesses were examined in support of the said charge, and that he the said *A. T.* being also examined, did upon that occasion give in his examination, which was afterwards reduced into writing and signed by him the said *A. T.*, in which examination he the said *A. T.* gave an account of the several places at which he had been during the night of the 26th and the morning of the 27th of *May*, and the several times at which he had been at such places respectively, and described the several persons whom he met and saw during such night and morning. And the said *A. T.* further says, there is no fact stated by him the said *A. T.*, upon such his examination as aforesaid, which hath been in any manner contradicted by any evidence which was then given or hath been subsequently given, but that on the contrary thereof many of the said facts, and all the material facts stated in the said examination, have since been fully confirmed and corroborated by various witnesses, as well as those called in support of the prosecution of the indictment hereinafter next mentioned as those called on the part of the said *A. T.* in his defence thereto, to wit, at, &c. [The replication then proceeded to set out the record of acquittal of *Abraham Thornton*, on an indictment for the murder of *Mary Ashford* at the assizes for the county of *Warwick*, and averred that the said *A. T.* and *Mary Ashford* in the writ of appeal and count mentioned, were the same persons as the said *A. T.* and *Mary Ashford* in the indictment mentioned.

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And also the identity of the supposed murder in both.] And that the several facts and circumstances, and the said presumptions and proofs in the said counterplea mentioned, and thereby supposed to be violent and strong presumptions and proofs that he the said *A. T.* was and is guilty of the felony and murder aforesaid, in the said count alleged against him the said *A. T.* as aforesaid, and also the said several facts and circumstances in this replication mentioned were in substance and effect proved upon oath before the Court and jury at the said trial of the said indictment of the said *A. T.* for the murder of the said *Mary Ashford*. [The replication then further proceeded to set out a similar acquittal on an indictment for a rape, with similar averments of identity. And concluded as follows.] And so the said *Abraham Thornton* saith, that the several facts and circumstances in this replication set forth, afford stronger and more violent presumptions, and are stronger proofs that he the said *A. T.* is not guilty of the felony and murder whereof he is appealed as aforesaid, than the said presumptions and proofs in the said counterplea set forth, that he the said *A. T.* is guilty of the felony and murder whereof he is so appealed as aforesaid. And this he the said *A. T.* is ready to verify, wherefore he prays judgment, and that he may be admitted to wage battel in this appeal with him the said *W. Ashford*, &c.

To this there was a general demurrer and joinder therein.

Filday,
Feb. 6th.

Chitty in support of the demurrer. There are two objections to this replication. First, It is not competent for the appellee, in answer to a counterplea, to
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state, circumstances affording a presumption of innocence. Secondly, The circumstances stated in this replication, are not, if admissible, sufficient to raise that presumption. Before, however, these questions are discussed, it will be necessary to shew that the counterplea is by itself sufficient, inasmuch as if that be not good, it is of no consequence to shew that the replication is no answer to it.

The right of appeal had its origin at the common law, and many exceptions having been allowed to abate it, the statute of *Glocester* (a) was passed, which provided, that "if the appellor declare the deed, the year, the day, the hour, the time of the king, and the town where the deed was done, and with what weapon he was slain, the appeal shall stand in effect, and shall not be abated for default of fresh suit, if the party shall sue within the year and the day, after the deed done." Between the time of passing the above statute and the 3 *H. 7. c. 1.*, a practice had prevailed, not to put persons upon their trial by indictment at the suit of the king until the year and the day, (the time limited for bringing the appeal) had expired, at which period, the witnesses who were to prove the fact were often dead and the matter forgotten. To remedy this inconvenience, the 3 *H. 7. c. 1.* was passed, which ordained that indictments at the suit of the king should immediately be proceeded upon, and before appeal brought; and further provided, that the plea of *autrefois acquit*, or *autrefois attain* upon such indictment, should be no bar to the subsequent appeal, but that the appellant "should have such and the like advantage as if the

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said acquittal or attainder had not been." The statute recognizes therefore the right which the heir at law had at the common law, to bring an appeal for the death of his ancestor, and prevents the acquittal of the appellee from being an effectual bar to the suit. But upon the present occasion it becomes necessary to consider by what means the appellee who has waged his battel in answer to this appeal is to be ousted of that right; and in order to discuss that question properly, it will be necessary to see upon what grounds, and by what circumstances, that right is taken away. The authorities may be conveniently taken in the order of time in which they occur. The first is *Glanville* (a), who flourished in the time of H 2. A. D. 1154. In his book it is laid down, that in the case of an appeal, if it appears that there is a probable ground of suspicion, the party is not to be allowed to try the question by battel, but by the trial by ordeal, which at that time prevailed, and he says that the accuser in an appeal may decline duel either on account of his age, or mayhem, and then "tenetur se purgare si qui accusatur per dei iudicium scilicet per calidum ferrum vel per aquam pro diversitate conditionis hominum per ferrum callidum si fuerit homo liber per aquam si fuerit rusticus." And in chapter 2. he says, on a prosecution for a fraudulent concealment of treasure trove the defendant "presumptione contra eum faciente tenebitur per legem apparentem se purgare." And again, chapter 3., if a person be appealed of homicide, he is sometimes compelled to undergo the legal purgation, if he was taken in the flight by a crowd pursuing him, and this be

(a) *Glanv. lib. 14. c. 1.*

regularly proved in Court by a jury of the country. So that it should seem in this last case that there was a collateral issue to be tried (as is done in the case of an escape), on the event of which depended the question, whether the party was to be allowed his trial by battel or not. The next authority is *Bracton*. This author in his chapter entitled “*Qualiter captus produci debet coram justiciariis et quare justiciarii examinare debent in duello injungendo et judiciis, &c.*” has these words “*Cum autem productus fuerit et de crimine ei imposito accusatus, si crimen statim confiteatur satis planum erit judicium: si autem negaverit et crimen defenderit precise et sit aliquis qui eum appellat per verba legitima appellum facientia tunc autem defendit omnia precise quæ ei imponuntur et nihil excipit contra appellantem habebit electionem utrum se ponere velit super patriam utrum culpabilis sit de crimine ei imposito vel non vel defendendi se per corpus suum.*” He goes on then to state, that it is the duty of the judges *ex officio*, and even though the appellee may have omitted it, to examine into the “*factum et causam appellii*” and the proceedings, that they may see whether they are correct, and if all are correct, then to award the trial by battel; and he then subjoins these words: “*et hæc vera sunt, quod appellatus per corpus suum se defendere poterit cum appellatus fuerit, nisi aliqua violenta præsumptio faciat contra ipsum, quæ probationem non admittit in contrarium, per quam dedicere vel defendere posset mortem et feloniam: sicut esse potest cum quis captus fuerit super mortuum cum cultello cruentato: mortem dedicere non poterit: et hæc est constitutio antiqua in quo casu non est opus aliâ probatione: in quo casu non est necesse probare per corpus*

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nec per patriam ubi præsumptio violenta facit contra appellatum." (Lord *Ellenborough* C. J. So that if a man were found over a dead body with a bloody knife in his hand, it would, according to *Bracton*, be impossible for him to deny that he was the cause of the death, and he would be immediately condemned and executed. It certainly makes one retire with a degree of horror from the consideration of such laws, which prevented a man from explaining circumstances which, after all, were only *primâ facie*, and not conclusive evidence against him. *Abbott* J. A case might be put where a person should come up and find another lying wounded with a dagger in his body, and should draw it out, or should in assisting the wounded man wrench the knife out of the murderer's hand. Then if the murderer escaped leaving him with the body, according to this law he would be considered guilty of the murder, and be immediately hanged without a trial.) That hasty construction of guilt seems to have been afterwards abandoned, and it is not material to consider whether in such cases the courts would now award instant execution, because the only conclusion sought to be established here is, that in such cases the appellee is not to be allowed his *wager of battel*; and though *Bracton* says, that in such case it is not necessary to prove it *per corpus nec per patriam*, still at least this must be considered as an authority to shew that in such cases the appellee, at all events, may not prove it *per corpus*, and that will be sufficient upon the present occasion. *Bracton* then goes on to put several other cases, as instances of the violenta præsumptio, such as "*Si quis jacuerit in domo aliquâ de nocte solus cum aliquo qui fuerit interfectus;*" and this — "*Si duo ibi fuerint vel*
plures

plures et hutesium non levaverint nec plagam a latronibus vel aliis qui interfecerint in defensione faciendâ non receperint vel nec quis hominem interfecerit ostenderint de se vel de aliis." In these cases "mortem dedicere non poterunt;" and then there follows a still more remarkable passage: "Si quis in domum suam notum vel ignotum receperit hospitandi causâ vel alia hujusmodi et qui sanus et vivus visus fuit intrare et nunquam postea nisi mortuus, dominus domûs si tunc domi fuerit vel alii de familiâ qui tunc præsentes fuerunt pœnam capitalem non evadent nisi forte per patriam fuerint liberati *si judicarii perspexerint veritatem per patriam debere inquire.*" He then puts the instance of a servant and his master sleeping in one house, and the master being found dead in the morning, and adds, "Homo tenebitur qui nec clamorem levavit nec plagam receperit nec in aliquo se opposuit ad defensionem: et idem dici poterit de extraneo quia vix evadere poterit periculum per inquisitionem patriæ propter tam gravem præsumptionem datam de tam occulto facto. Sed cum patria veritatem scire non possit de tam occulto facto qualiter liberabitur ille qui super patriam se posuerit? revera satis liberat quia expressè non condemnat sicut dici poterit de chartâ cum satis acquietat ex quo specialiter non onerat. Item poterit factum esse tam occultum quod secta sit nulla vel minus rite facta tamen calumniari non poterit quia initium facti sciri non poterit sicut de veneno dato: et quo casu non habebit appellatus electionem utrum se ponere velit super patriam vel defendere se per corpus suum — sed oportet quod defendat se per corpus suum, quia patria nihil scire poterit de facto nisi per presumptionem et per auditum vel per mandatum quod quidem
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non sufficit ad probationem pro appellante nec pro appellato ad liberationem." From the above passages it should seem that in some cases of violent presumption the justices had a power to order execution "nisi forte perspexerint veritatem per patriam debere inquiri."—A discretion was therefore given them (the party being at all events ousted of the trial by battel in such cases) to send the appellee to a jury or not. And there is another instance afterwards put which shows forcibly in what sort of cases the battel was given, viz. where as in veneno dato there was no evidence for the jury. In such a case the appellee was compelled to fight. The next authority is Fleta, who wrote in 1272. He copies Bracton nearly verbatim, and it is not therefore necessary to give any passages from him. He states no further instances of the violenta presumptio than have been already cited. *Britton* (who wrote in 1300), c. 22. p. 40., Title of Appeals, enumerates the circumstances which will oust the appellee of battel. He says, "Many things however may destroy the right of battel in every felony, for if the appellant be mayhemed, or be within the years of fourteen, or beyond the age of seventy years, or be ordained within holy orders, or be a woman, or if being a man he can aid himself by matter of record, then he shall say, 'and this I am ready to prove in every manner which the Court shall award;'" (a) and he adds, that the appellee shall not have his election of wager of battel if there is evidence to support

(a) This passage in *Britton* seems to have reference only to the form of the count, which was materially different in cases where either from age, sex, or mayhem, the appellant was exempted from the battel, and those where he was not. In the former cases the words per corpus suum were omitted; in the latter they were not. This will very clearly

port his defence, or if he can aid himself by matter of record. So in *Horne's Mirror*, p. 158. A.D. 1307. in addition to the other circumstances ousting battel, it is stated, if a party be indicted of the felony or murder he shall not wage battel. [*Bayley J.* Does that mean that he shall not wage battel on the indictment, or that there being a collateral indictment found against him it shall oust him of his wager of battel?](a)
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clearly appear from the terminations in the different appeals stated by *Bracton*, which are subjoined.

- | | | |
|---|---|---|
| Appeal of murder,
fol. 138. | { | Offert se disrationare <i>per corpus suum</i> sicut ille
qui præsens fuit et hoc vidit <i>et sicut curia Domini</i>
regis considerat. |
| Appeal de pace et
plagis, fol. 144. | | Offert se probare versus eum <i>per corpus suum</i>
sicut curia considerat. |
| Appeal de pace et
imprisonamento,
fo. 145. b. | { | Offert probare <i>per corpus suum</i> vel alio modo
sicut curia Domini regis consideravit. |
| Appeal of robbery,
fol. 146. | | Offert se disrationare versus eum <i>per corpus</i>
<i>suum</i> sicut curia considerat. |
| Appeal of arson
and robbery, fol.
146. b. | { | Offert se disrationare ut <i>suprà</i> . |
| Appeal of mayhem,
fol. 144. b. | | Offert se disrationare versus eum <i>sicut homo ma-</i>
<i>bematus</i> prout curia Domini regis consideraverit. |
| Appeal of rape,
fol. 147. | { | A. Fæmina talis ——— offert probare versus ip-
sum sicut curia Domini regis consideraverit. |
| Appeal by a widow,
of the death of
her husband, fol.
148. b. | | Offert probare, &c. ut <i>suprà</i> . |

(a) The reason here assigned in argument is perhaps not the true one, and certainly is by no means satisfactory. It is unquestionably laid down by various authorities, that a previous indictment is an answer to the wager of battel; but the cases, if carefully examined, will probably be found to be those where the indictment at the suit of the king is still pending. As in *Rastal*. p. 50., where the plea is of an indictment still remaining before the coroner. There does not seem to be any good reason why an indictment on which there has been a verdict of acquittal should deprive the party acquitted of any the least advantage. But a very satisfactory reason may be assigned why an indictment still pending should deprive the party of his wager of battel.

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The finding of the bill by the grand jury affords a strong presumption of the guilt of the party, and therefore he was not permitted to wage his battel. The next and most important authority is that of *Stamford's Pleas of the Crown*, lib. 3. c. 13. p. 176. His words are these, "Trial by battel is another trial which a defendant in an appeal of felony may elect, that is, to fight with the appellant by way of trial whether he is guilty of the felony or not, and if the event of such battel be so favourable to the defendant that he vanquish the appellant, he shall go quit with respect to the appellant, and bar him of his appeal for ever. And this is an ancient mode of trial in our law, and one much used in time past, as appears by divers precedents in the time of *Edw. 3.* and *H. 4.*, which is not so disused but that it may be brought into use at this day if the

Bracton, lib. 3. c. 19. sect. 8. "Cum autem elegerit defensionem per corpus suum et omnia concurrant que jungunt appellum statim vadetur duellum et quo casu si a pluribus appellatus fuerit de uno facto et una plagâ et versus unum se defenderit recedet quietus versus omnes alios appellantes *et etiam de sectâ regis*, quis per hoc purgat innocentiam suam versus omnes ac si se poneret super patriam et patria omnino ipsam acquietaverit."

Suppose then an appeal and an indictment pending at the same time. If the party in the appeal waged his battel and conquered he might then plead his acquittal by battel in bar of the indictment. But this would be in effect waging battel against the king, which by all the books he may not do. The Courts, therefore, might with great propriety in such a case refuse the wager of battel to the appellee. But where there has been a verdict on the indictment the case is otherwise. For there the king is *already barred by the verdict*, and the acquittal of the party by battel has no effect. This distinction between an indictment pending and not pending at the time of the appeal does not, however, seem (from the accounts here received) to have been at all adverted to in the case of the appeal now depending in the Court of K. B. in *Ireland*, where the appellant has, in answer to the wager of battel, put in a counterplea, stating the indictment on which the appellee had been previously arraigned and acquitted.

defendant pleases, and there be nothing to support the counterplea of the other party." And in chap. 15. p. 178., it is said that "the reason why a man should be admitted in a case of appeal to try his cause by battel, seems to be this, that no evident or probable matter appears against him to prove him guilty of felony, but only a bare accusation of the plaintiff or plaintiffs, who are not credible witnesses in their own cause. Because in that the appellant demands judgment of death against the appellee, it is more reasonable that he should hazard his life with the defendant for the trial of it, if the defendant require it, than to put it on the country, who for default of evidence may be ignorant of it, and to leave God to whom all things are open, to give the verdict in such case Scilicet, by attributing the victory or vanquishment to the one party or the other as it pleaseth him; and for this our books are, that if there be any thing which may serve the plaintiff for presumption or testimony that his cause is true, he shall oust the defendant of his trial by battel, as if the defendant was indicted of this felony before the appeal commenced, or was taken with the mainour." He then quotes *Bracton*, book 2., respecting the nature of these presumptions, and adds, that "*Britton* agrees with him, so that it appears by *Bracton* and *Britton* that in ancient times some of these presumptions were so vehement, that they were as condemnation to the other party, without any other trial, *but they are not so at this day*: for trial he shall have notwithstanding such presumption, *but not by battel*, as appears in *Fitzherbert's Abridgement*, title *Corone*, pl. 411., where a man was appealed of the death of his wife et coronator villæ cum probis hominibus

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nibus hoc testatur est hoc idem testificatur dicens se capisse eum super factum cum cultello sanguinolento ideo consideratum est quod se non defendet per duellum. And note the mainour in an appeal of death is a bloody knife with which being taken he shall be ousted of his wager of battel, and so it shall be in an appeal of robbery." From this passage of *Stauford*, it appears that there was an alteration of the law. For in *Bracton's* time these presumptions produced immediate execution, but in the time of *Stauford* they were only held to oust the defendant of his wager of battel, and to compel him to put himself upon the country. *Stauford*, it is observable, wrote soon after the statute 3 H. 7. c. 1. passed, and at a period, therefore, when the attention of lawyers was directed to this subject. Soon after the work came out, much discussion arose amongst antiquaries respecting the trial by battel, and a good many of these contemporary works are to be found in *Hearne's* collection of curious discourses. There is there a tract of Sir *Robert Cotton* on this subject, page 172.; another by Mr. *Whitcombe*, p. 203., and a third by Mr. *Algar*, p. 217. Without going through long extracts from these works, the result of them all seems to be this, that wherever there exists legal proof which can be adduced by the appellant, the appellee is ousted of his trial by battel. *Pulton* who wrote his book "De pacē regis et regni" in 1609, and after the subject had undergone this discussion, agrees fully with *Stauford*. *Finch's Law*, p. 421., is to the same effect as *Pulton*; and so are *Co. Litt.* 294. b., and 2 *Inst.* 240., which assign a similar reason (viz. where there is no other evidence) for the wager of battel in the trial of a writ of right. He then cited *Hawkins'*

Pleas of the Crown, lib. 2. c. 45. s. 7.; *Blackst. Com.* vol. 3. 446.; *Dufresne's Glossary*, p. 187.; *Montesquieu's Esprit des Loix*, lib. 28. c. 25.; *Robertson's History of Charles V.* vol. 1. p. 275.; *Reeves' Hist. English Law*, vol. 2. p. 25.; *Henry's Hist. of Great Britain*, vol. 1. p. 332. The result of the law as laid down by *Stamford*, and the authorities subsequent to him, seems to be, that where evident or probable matter for the consideration of a jury exists, there the appellec shall not have his battel, but must put himself on the country. So that in this respect a modification took place of the older authorities, and a less violent presumption was held to be the subject of a valid counter-plea. The same rule is deducible from the cases which are to be found in the year books and the other reports. This appears from *Fitzherbert's Abridgement*, tit. *Corone*, pl. 407. before cited, 20 *E. 4.* 6., and from *Bro. Abr.* tit. *Battaile*, pl. 4. Where it is laid down, that when a man is taken at the suit of the party, and escapes and flies, he shall not have battel, because he has broken the king's prison; and in the same book, placitum 5. Appeal of robbery before the justices at *Newgate*, defendant tendered battel, and ousted, because he had the mainour in the presence of others; and 12 *E. 2.* agrees with this. So also in pl. 11., if defendant be indicted for the same fact, and this indictment be in court, defendant shall not wage battel if indictment be good, but otherwise if indictment be bad. [*Abbott J.* These authorities carry it no further than the quotations from the elementary writers.] In *Rex v. Sir Robert Tresilian and Others*, 1 *St. Trials*, 11., the House of Lords refused the wager of battel to *Sir Nicholas Brambre*, even after the appellants had accepted it, and resolved that they

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they would examine the articles touching the said *Nicholas*, and take due information, by all true, necessary, and convenient ways, that their consciences might be truly directed, &c. And in the note of the learned editor, it is laid down that in appeals of treason, battel does not lie, if it can be proved by witnesses; and for this, the case of Lord *Clarendon*, A.D. 1667, is cited.

The result of all these authorities being, that in cases where strong and vehement presumptions exist, the party who was formerly subject to instant execution, is now only ousted of his trial by battel; it becomes necessary to shew that the counterplea here discloses grounds for a violent presumption of guilt, and therefore that the battel cannot be allowed. The principal circumstances disclosed by the counterplea are these: that *Mary Ashford*, at seven in the morning, on the 27th of *May*, was found dead in a pit of water—that she had been recently alive—had been drowned—and that recently before her death some man had had carnal knowledge of her, up to which period she had been a virgin; that her arms had been forcibly grasped, and that there were stains of blood about her person. [*Bayley J.* There is nothing stated in the counterplea from whence a necessary inference arises of her having been thrown into the pit; what is there to shew that she might not have thrown herself in, or have tumbled in?] There were marks of blood on some clover grass about a foot and a half from the footpath, and the counterplea states that the grass was covered with dew; the blood therefore must have flowed from some person's body carried by some one else along the footpath; as there would otherwise have been the impression of a foot displacing the dew upon the grass. [*Bayley J.* It

It is not alleged that the clover was in such a state as that if trod on it would necessarily have exhibited the marks; nor is it stated whether the blood might not have been there before the dew fell. In order to exclude the party from this mode of trial, you must allege positively that the blood displaced the dew, and not leave it entirely to inference.] The counter-plea further states a coarse declaration by the appellee, that he would have carnal knowledge of her, or die by her; and that he was seen with her about three o'clock in the morning: that both their footsteps were traced, near the pit, and over a harrowed field, — that it appeared from them that she had attempted to escape, — that he had overtaken her, — that they then proceeded together to a place where there was an impression of a human figure on the grass with the legs and arms extended, and where there was an effusion of blood: that his footsteps alone were then traced from thence to within forty yards of the pit, where the hardness of the ground prevented their being further visible, and that there were marks of the footsteps of the appellee, running in a direction from the pit alone across the harrowed field and leading towards *Holden's* house, and also that very near to the edge of the bank of the pit, where the unfortunate girl was found, there was the mark of the shoe of a man's left foot. [*Bayley J.* That is not described as a recent impression — nor that it corresponded with *Thornton's* shoe. It is not even stated that *Thornton's* shoe was compared with it and found to be different, nor that from the state of the impression comparison was impossible.] It is stated that he on that night wore right and left shoes; and further that, upon his being searched, his linen was found stained with

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blood, and that he admitted that on the preceding night he had had carnal knowledge of *Mary Ashford* with her own consent. These circumstances taken together, afford a strong presumption of guilt, and indeed a much stronger one than those mentioned by *Bracton*. For if it be said that these circumstances admit of an explanation, it may be answered, that the cases there stated did so too; for a man might have slept alone in the house with the murdered person, or be found over the body with a bloody knife, and still not be the murderer. But in those cases, as in this, the strong presumption of guilt arising from the facts stated, is sufficient to oust the battle. If it be argued that the cases in which this has been done, are where the party is taken with the mainour, it may be answered that that is only put as an instance of the general rule; which is, that wherever there is strong evidence or presumption of guilt, the question ought to be decided by a jury.

The counterplea therefore being established, the next question is, does the replication afford an answer to it. No case can be found in the books, in which an appellee has been permitted to reply fresh facts by way of a counter presumption of innocence. The only answer to be given, is by a traverse of the facts alleged in the counterplea. This replication does not deny any of the facts in the counterplea, but endeavours to set up an alibi and alleges his former acquittal. With respect to the alibi that would be good ground for the decision of a jury, and the acquittal by the statute 3 H. 7. is made unavailable. Besides that proceeding, which was at the suit of the king, is as to this case *res inter alios acta*, and might have been founded upon different
evi-

evidence. The public prosecution may have been conducted with less zeal for public justice, and the prosecutor may have neglected purposely to bring forward sufficient evidence. [*Bayley J.* So that you contend that an indictment would have barred the right of battel, but that the acquittal is to have no weight. *Abbott J.* The indictment is as much res inter alios acta as the acquittal.] But supposing it be competent for the appellee to set up an alibi, that which he has stated is not sufficient, for the whole question of time, on which this alibi must stand or fall, appears to be this, that about a quarter after four she left *Mary Butler's* house, and within a quarter of an hour of that time, she was last seen by a witness; it is not therefore precisely alleged what time this was. Then there does come a precise averment that not more than twenty-five minutes before five, the appellee was seen at *John Holden's* house, a distance of a mile and a half from the pit. The whole turns on a few minutes more or less. This therefore cannot be considered as a sufficient alibi to remove the presumptions of guilt that the facts in the counterplea have raised. [*Bayley J.* You do not state it quite accurately. The fact is this; she leaves *Mary Butler's*, as stated in your counterplea, at about a quarter after four. In about or near a quarter of an hour afterwards, she is seen first by one man and then by another in *Bell Lane*. She has then to go through *Bell Lane*, and, according to the supposition of the facts in the counterplea, she has to cross the harrowed field, to be met by him, then to run away and to be overtaken, and then after the criminal intercourse had taken place, to be carried from thence to the pit and thrown in, and then the

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appellee had to run and to be close to *John Holden's* house at 25 minutes before five, which by the nearest way is a mile and a half, and by the readiest way nearly two miles from the spot; and besides, all this must have happened in broad day-light, and when a good many people appear to have been about. The great difficulty after all is, whether the footsteps in the harrowed field were imprinted before four o'clock or after, the parties having been seen together at three o'clock near that spot.]

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Tindal contrà, made four points, first, that the trial by battel was the undoubted right of the defendant and not of the plaintiff in an appeal. Secondly, That the counterplea did not bring the case within the exceptions, which the law allows to a wager of battel, and that it was too vague and uncertain in its statement of the facts contained in it. Thirdly, That if the counterplea was admissible, the replication contained a complete answer to it: and lastly, that the proper judgment to be given by the Court upon this record, was not that the defendant should be allowed his wager of battel, but that he should go without day.

As to the first point, it is observable that this mode of trial was brought into *England* by the *Normans*. This appears from the collection of *Saxon* laws by *Lambard* in his "Tractatus de priscis Anglorum legibus," in which there is no allusion to the trial by battel. In the laws however of *William* the Conqueror, set out in the above collection, and also in the *Notæ*, &c. ad *Eadmerum*, by *Selden*, 4 *Oper. Seld.* p. 1658. it is most distinctly pointed out. It is there declared, that if a *Frenchman* appeals an *Englishman* of perjury, murder,

murder, theft, manslaughter, or robbery, "*Anglus se defendat per quod melius noverit aut judicio ferri aut duello.*" The law therefore being of *Norman* origin, and unknown in this country before the Conquest, it seems material to examine into their books on this subject. In the *Grand Coustumier* of Normandy, "*de snyte de meurdre, c. 68. fol. lxxi.*" there is this passage, "*suyte de meurdre should be in this manner; R. complains of T., who has murdered his father feloniously in the peace of God and of the duke, which he is ready to prove, and to make him acknowledge en une heure du jour.*" These last words mean "in some hour of the day," or "during the day," for if the battel lasted until the stars began to shine, the defendant gained the victory; for, as *Bracton* expressly says, the appellant undertook to make him acknowledge it "*unâ horâ diei.*" The book goes on to say, "if *T.* denies this, word for word, and offers his pledge, and to defend himself of it, they ought first to take the pledge of the defendant, and then that of the appellor." Then there is a note. "It appears that the defendant ought first to throw his gage, and the plaintiff afterwards." So far then the right appears inherent in the appellee. *Glanville* is not so express upon the subject. His words are, lib. 14. c. 1. "*Accusato quoque è contra adversus eundem per omnia in curiâ legitime negante tunc per duellum solet placitum terminari.*" So that it does not clearly appear from this author in whom the election was. Then comes *Bracton*, who of all the early writers is the most full upon the subject. He states the right most distinctly to be that of the defendant, for he says, that when the defendant is brought into court "*habebit electionem utrum se ponere velit super patriam vel de-*

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fendendi se per corpus suum. Lib. 3. c. 18. fol. 137. *Fleta*, lib. 1. c. 31. follows *Bracton*, and in almost precisely the same words, which brings it to the time of *Edward 1st*: (for in *Fleta* and in *Britton*, who also wrote a little later, reference is made to the statute of *Westminster 2d*, 13 E. 1.,) and *Britton* varies no further from *Fleta* and *Bracton*, than in translating their *Latin* into *Norman French*. *Staunford*, who wrote in the time of *Edward the 6th*, copies according to his usual mode both the passages from *Bracton* and from *Britton*, and therefore carries it no further than those authors had done. The last author on this point to be cited is *Coke*, 2d *Inst.* 247. He says, "in case of life in an appeal of felony, the defendant may chuse either to put himself on his country, or to try it by body to body." So that there is a regular chain of authorities proving that the trial by battel is the defendant's right.

Then if so, it is the duty of the appellant who seeks to oust him of this right to bring the case within some of the exceptions contained in the books, and the second point is, that the counterplea does not do so. All the cases in which the wager of battel has been taken from the defendant fall under one or other of these heads; viz. where the guilt of the party is self-evident; or where there is some single fact capable of proof by the inspection of the Court; or where the appellant avails himself of some matter of record. The first case that is reported is in *Fitzherbert's Abridgment*, tit. *Corone*, pl. 125., where in an appeal of robbery sued by a citizen of *London* defendant waged battel, to which the plaintiff said, that he was a citizen of *London*, and that they have a franchise that no battel shall be waged

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against them: the defendant demanded judgment inasmuch as the plaintiff tendered by his count a proof by his body, and after an argument on this point, the plaintiff voluntarily rejoined the battel, upon which the citizens of *London* sent before the Court a writ reciting their franchise, and demanding that the Court should not allow the battel in prejudice of their franchise, upon which curia adv. vult. This therefore is a case where the right to battel is sought to be ousted by matter of record. The next class of cases is, where the party is taken with the mainour. *Fitzherbert*, tit. *Corone*, pl. 144. A man was taken with cloth and a horse which he had stolen, and was appealed, and would have defended himself "par son mayn," but *Wilby J.* said, For this that we see the mainour with you, you shall not be received to this issue. So pl. 204. One *A.* was arraigned with the mainour; this is to say, with two pieces of tapestry, and two linen frocks, and in pl. 230. there was an appeal of robbery, and held, that if defendant waged battel, the plaintiff may bring the mainour into court, and oust him of his battel; and *Gascoigne C. J.* said, If the defendant waged battel, the plaintiff may oust him of his battel, as to say, that the defendant maimed him at the time of the robbery, and then may shew the maim to the Court. So that here there is another species of excuse to be proved by the actual inspection of the Court. So in *Bro. Abr.* tit. *Appeal*, pl. 23. 7 *H. 4.* 43. If a man be robbed in *London*, and the felon with the mainour escape into *Middlesex*, the appeal may be well brought in *Middlesex*, and that in whatever county or place the felony may have been committed; yet upon an appeal in banco regis the mainour shall be brought into court. There

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is one other case in *Bro. Abr. tit. Bataille*, pl. 7. 22 *Ed. 4.* 19. where the mainour being brought into court proved to be twenty pence, and *Fairfax J.* says, This not mainour, for one penny cannot be known from another; so that here there was an objection taken as to the sufficiency of the mainour, which shows that in this and the other cases there must have been an examination entered into before the Judges, similar perhaps to the trial by proofs in a writ of dower, and that the facts, as to the taking and the identity of the property, must have been brought before them by a sort of preliminary investigation before they determined whether the trial should take place by wager of battel or by the country. (a) There is another set of cases in which the escape of the defendant from prison ousts his wager of battel. *Fitzherbert, Corone*, pl. 154. There a collateral issue was joined, whether the appellee had broken prison or not, and a writ was issued to the sheriff to certify to the Judges as to the breaking of the prison, which, as it appears from pl. 435., he might do; the words in the latter place being, "that coroners may record the breaking of prison, and by that record the prisoners may be hanged." After the sheriff's return to the writ, the appellee replied a charter of pardon as to the breach of prison, and the Court received it, and restored him to his wager of battel. And in pl. 157. objection was taken, that as the defendant was leading to prison he betook himself to flight, and so broke the prison of the king. The appellee was put to answer this, and he

(a) *Stauford*, fol. 179. a. gives this reason why the being taken in the mainour ousted the appellee of his wager of battel. Et nul marveil si mainour est sufficie't chose de luy ouster de battail. Car in an'cie't te'ps le fellon pourroit avoir este arrain sur ceo auxi avant come il serroit sur enditement.

said that he never was attached by an officer of the king: whereupon a writ issued to inquire, &c. So that whether there was a constructive or an actual breaking of the prison, it was always tried by a matter of record. And these cases are material in another point of view; for here the appellee replies fresh matter to the counterplea of the appellant. These are all the decided cases that are to be found in the books, except that on which *Bracton* relies, which is to be found in *Fitzherbert*, Cor. pl. 411. Hil. 6 H. 3. A man is appealed for that he killed his wife, and the coroner of the ville with true and lawful men testify this, and *S.* also testifies it, and that he took him super factum (in the act) with the bloody knife; et ideo consideratum est quod non debet defendere se per battallum." With this exception, all the others are cases where the party is ousted of his trial by battel either by matter of record, or by actual inspection of the Court; for the mainour and the maim are tried by the inspection of the Court, and the breaking of the prison, and the citizenship of *London*, are tried by matter of record: so that neither in the year books, in *Fitzherbert*, nor in *Brooke* is there any case but this, in which any thing tending to shew the guilt or innocence of the party could be submitted to a previous trial by the country to ascertain whether the trial by battel should be allowed. [*Abbott J.* And in this case the coroner certifies it to the Court. (a)] These being the authorities contained

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(a) It may be a question whether this was not by the older writers classed as a case of taking with the mainour. For *Stauford* says of it, "Et nota que le mainour in appel de mort un sanguinolent culteau ove quel esteant prise il serra ouste de batail gager." It should seem that *S.* was in this case examined as a witness by the Court. As in a

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in the books from which the text writers have taken their law, and upon which they as well as others must rely, the law is rather to be deduced from them, than from the text writers if there be any diversity. In addition to the causes of exemption mentioned by *Bracton* in the passages quoted by the other side, there are others contained, *Lib. 3. c. 21. sect. 12.* These are mayhem, age above sixty years, regia dignitas, and sex, where a woman brings the appeal *de morte viri sui*. But it is observable that all these fall within the rule laid down; for the Court, as appears before, are to see the mayhem: as to sex and regia dignitas, they can take official notice of both these, and with respect to age above sixty years, they may try it by proof as they do in cases of dower. [*Bayley J.* I think the practice in these cases, is for the Court to receive affidavits for the purpose of guiding its judgment.] And in the case of taking with the mainour, there must have been some proof given before the Court by affidavit or otherwise. *Fleta* follows *Bracton* in these additional exceptions, and so the law remained until the time of *Stamford*, who is the first writer who has made any addition to them. If his expressions be taken to the letter, they might support the counterplea: but they are not to be taken literally. The statute of *H. 7.* nearly put an end to the practice of bringing appeals, for after that time, the usual mode of proceeding was by indictment,

trial by proof: In dower, defendant pleaded that the husband was alive, et hoc paratus est verificare; to which the woman replied, that he died at *F.*, and was buried there, et hoc paratus est verificare qualitercunque, &c. Ideo consideratum est quid prædictus *M.* doceat de morte et dictus *R.* de vitâ viri et super hoc dies data est; at which day the woman examined two witnesses in court, and had judgment. *Mss. 14. pl. 555. Pasch. 2 Eliz., Thorn v. Rolfe.*

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upon which the party being convicted was punished, and then no appeal was necessary. And in fact there are not many cases upon record subsequent to that period. Now *Staunford* wrote nearly sixty years after that statute; and if therefore he advances law unauthorized by the older writers, the probability is that he is wrong. Then as to the passage itself, he says, "The reason why a man in an appeal shall be admitted to try by battel, seems to be this, that no evident or probable matter appears against him." Now no such reason, as appears from the books, was ever given before, and the reason itself is bad. [*Bayley* J. It excludes battel in all cases of doubt, saying, that if there be any evidence, there shall be no battel, and it is obvious, that if there be none, the party would not require it. Lord *Ellenborough* C. J. It is giving a man the power to fight only in those cases where he must fight for fighting's sake alone.] The chapter therefore, is not entitled to any greater authority than that of the books which are quoted in its margin. *Staunford* further says, "Our books are, that if there be any thing which can serve the plaintiff for a presumption or testimony that his cause is true, he shall oust the defendant of his battel." But where are the books that state this, for he cites none? Though he be a good compiler, he still is but a compiler, and here he cites no authority for his position. He then proceeds to exemplify it, and the examples are, "as if the defendant be indicted, or be taken with the mainour," and then proceeds as is his custom, to set down the passages from *Bracton* and *Britton* which have been already quoted. The authorities therefore which he cites, and the examples which he produces, by no means prove the position, which therefore is entitled to

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no weight. Besides, if a counterplea framed upon this authority were traversed, how could such preliminary issue be tried? by what means is the Court to summon a *Warwickshire* jury for that purpose? Then if the law has provided no means for trying the truth of such a plea, it is a strong argument to shew that such a plea is inadmissible. But the counterplea itself is bad: it begins by stating that there are the violent presumptions and proofs following, that is to say, &c. Now this is an inaccurate mode of expression, for a presumption is an inference deducible from proofs, and if issue were taken upon it, what would there be to be tried? It then proceeds to state, that it appeared and was manifest to divers credible witnesses, that, &c. Not that it was so, but that it appeared so to certain persons, and those not named. Now how can the opinion of unknown persons as to facts be tried? there might be twenty persons present, ten of whom might be of one opinion, and ten of another, and yet this fact would support the counterplea as framed.

The Court then called upon *Chitty*, who contended that this mode of pleading was sufficient, for it could not have appeared to the credible witnesses if it were not so. But that at all events the objection only went to part of the allegations in the counterplea, and supposing them to be struck out, there would still remain sufficient to oust the appellee of the battel. *The Court* then directed *Tindal* to proceed.

The third point is, that if this be a good counterplea, the replication is a good answer. The first objection to the replication is, that the time when *Mary Ashford* left the house of *Mary Butler*, upon which the alibi materially depends, is alleged in too uncertain

uncertain a manner as being at *about* a quarter past four. But this period of time is taken from the counterplea, and is a fact not within the knowledge of the defendant. He therefore was obliged in framing his answer to their plea, to follow the time fixed by them; besides the time, after all, is left uncertain only for a few minutes more or less, and the alibi does not depend upon so nice a calculation. The second objection is, that the appellee had no right to put upon the record the acquittal upon the former indictment. But the construction put upon the statute of the 3 H. 7. c. 1. is not the true one. That act only took away the plea of *autrefois acquit*, or *autrefois attain*, but did not apply to a case like the present. The statute preserved the right of appeal, and prevented the acquittal from being a bar; but for collateral purposes the Court may, and do take notice that there has been an acquittal. *Castell v. Bambridge and Corbet*, 2 Strange 854., where the Court bailed *Bambridge* because he had been acquitted. And even supposing the appellee not to have a right to plead this, still enough will remain upon the replication to be an answer to the counterplea. But it is said the appellee has no right to set up counter presumptions of innocence. The case in *Fitzherbert* pl. 154. shews that fresh matter may be alleged by the defendant, and it would be extremely hard if it were not so. [Lord *Ellenborough* C. J. If one party has a right to state facts, the other party must have the same right; for a presumption means a conclusion drawn from the whole evidence, and the whole evidence must therefore be stated.] If it were not so there might be a complete *suppressio veri*, for they might take care not to state any thing in their plea which was false,

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but at the same time might omit every thing which made for the other party, and the appellee could gain nothing by traversing such a plea, for the issue must be found against him notwithstanding all the other circumstances favourable to him were proved at the trial. Then supposing the replication to be right in stating fresh matter, how does the case stand? *Mary Ashford* leaves *Mary Butler's* house at about a quarter past four; she has then one mile and a quarter to walk to the pit; allowing twenty minutes for this, which under all the circumstances is too short, it brings the time at which she arrives at the pit to 25 minutes before five. Now where is *Abraham Thornton* then? He is seen at *Holden's* house by four witnesses above all suspicion, at a distance of more than one mile and a half from the pit. Now besides this, there is the running about, there is the pursuit, there is the rape, and lastly the murder, to be committed; all which must have taken some time: suppose a quarter of an hour is allowed for all this, that will bring the time at which *Thornton* must be supposed to have left the pit to ten minutes before five, the very period of time when he is seen talking with a man of the name of *John Haydon* one mile further on: so that then he was more than two miles and a half from the pit. The replication then goes on to carry him by the testimony of other persons in a regular course on his road to his father's house at *Castle Bromwich*. If this be so, it is not only improbable, but impossible that he could have committed the murder; and the replication therefore is a complete answer to the counterplea.

The last point is, that if judgment on this demurrer be given for the appellee, it must be, not that he be
allowed

allowed his wager of battel, but that the appellor take nothing by his writ, and that the appellee go thereof without day. And though this is not the prayer of the replication, still if the appellee be entitled to it, the Court will ex officio award the true judgment, as is laid down in *Plowden*, 66. And in *Le Bret v. Papillon*, 4 *East*, 502., the Court held that they might and ought ex officio to give such judgment on the whole record as ought to be given without regard to the issues found, or to any imperfection in the prayer of judgment made on either side. In *Rastal's Entries*, 50. there is a record of this sort. The appellee there waged his battel, to which there was a counterplea of an indictment; replication nul tiel record, and prayer *that the defendant may be admitted to wage his battel*. The Court issued a certiorari to the coroner to return the indictment; who returned that he had no such indictment: whereupon the appellee prayed the judgment of the Court, that the writ of appeal might be quashed; and the Court gave judgment that he should go thereof without day. (a)

[*Bayley*

(a) The following abstract of the pleadings in this case, in *Rastal*, was read by Mr. Justice *Abbott*, having been abstracted by Mr. *Dealtry* from the original record, which was produced in court:

SMYTH v. RUSTON, HEPEY, and Others.

Coventry Sc. — *Thomas Smyth*, the brother and heir of *Richard Smyth*, appeals *Richard Ruston* and *John Hepey* of the death of the said *Richard Smyth*, charging that *Lawrence Wynstanley* committed the murder on *St. Lawrence's-day*, 13 *Hen. 6.*; and *Robert Bayle*, *Richard Ruston*, *Hewy Asheley*, and *John Hepey*, commanded, abetted, and assisted him. — *Ruston* and *Hepey* appear, and *Ruston* pleads that his name is *Ruston*, which he is ready to verify; and as to the felony and murder, he pleads not guilty, and puts himself upon the country; and *Smyth* doth the like.

Hepey pleads that he is not guilty, and this he is ready to defend against the said *Thomas* by his body; and therefore he wages battel, &c.

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[*Bayley J.* There there was a false fact alleged in the counterplea.] No solid distinction can be taken on that ground, for here the replication contradicts the counterplea, and the demurrer admits the facts contained in the replication to be true. Suppose after the battel had been awarded the plaintiff should confess the appeal to be false, or that the murdered person were produced alive in court, would the Court permit the battel to proceed? These are not imaginary cases, for *Bro. Abr. Appeal*, pl. 151. 13 *H. 4.* and 11 *R. 2.* the plaintiff

Thomas Smyth replies, that *Ruston* is as well known by that name as by the name of *Ruston*, and prays that this may be inquired by the country; and *Ruston* doth the like.

And he says, that *Hepey* ought not to be permitted to wage battel with him, because he says that on the feast of *St. Lawrence*, 13 *Hen. 6.*, before *Robert Topcliff*, coroner of the city of *Coventry*, upon view of the body of *Richard Smyth*, by the oath of twelve jurors it was presented, That *Wynstanley* committed the murder, and that *Boyle*, *Ruston*, *Asheley*, and *Hepey* commanded, &c. &c.; and this he is ready to verify, &c. and he prays judgment that the said *John Hepey* may not be admitted to wage battel, &c. And he prays the writ of our lord the king to be directed to the coroner to certify the indictment; and it is granted to him, returnable in one month of *Easter*, wheresoever, &c.

And the said *John Hepey* saith, that there is not any such record of any such indictment as the said *Thomas Smyth* has alleged; and this he is ready to verify; and thereupon he prays judgment, and that he may be admitted to wage battel with the said *Thomas*.

The trial of the issue with *Ruston* is put off until *Wynstanley*, the principal, be in some manner lawfully convicted. And *Ruston* and *Hepey* are admitted to bail.

In one month of *Easter*, *Smyth* comes by his attorney, and *Ruston* and *Hepey* in their proper persons. — And the coroner returned that there is not, nor doth there remain with him, any indictment against the said *John Hepey* of the death aforesaid. Whereupon the said *John Hepey* prays that the original writ of appeal may be altogether quashed and vacated, and that he may be dismissed by the Court here. — *Curia non advisatur* — Upon which day is given to the octave of *St. John the Baptist*. And *Ruston* and *Hepey* are again delivered to bail.

At which day come, as well *Thomas Smyth* by his attorney as *Ruston* and *Hepey* in their proper persons; and *Hepey*, as before, prays that the original writ of appeal may be altogether quashed, &c.

Whereupon it is considered, That the said *John Hepey*, as to the suit of the said *Thomas*, do go thereof without day, &c.

acknowledged his appeal to be false, and in the year-book, 8 H. 4. f. 17. the party supposed to be dead was produced in court. Now what distinction was there between those cases and the present? The replication here asserts facts which make it equally impossible for the appellee to be guilty, and these facts are by the demurrer admitted. *Bracton*, lib. 3. c. 20. f. 140. Item fit mentio de die ad quod eadem ratio poterit assignari et etiam alia quia si appellatus docere poterit per certa judicia et proborum hominum testificationem se eadem die fuisse alibi ita quod nullo modo præsumi posset contra ipsum quod interesse posset tali facto tali die propter locum ita remotum quod hoc esset impossibile, tunc cadet intentio appellantis. (a) *Fleta*, lib. 1. c. 34. sec. 28. is to the same effect. An admission of the falsehood of the appeal can never come too late; for *Stauford*, fo. 178. b. lays it down that even upon the field of battel, an acknowledgment that the appeal is false, is equivalent to a vanquishment. The appellee, therefore, is on this point also entitled to judgment. Notwithstanding then the opinion of the learned persons and foreign writers cited on the other side as to the inconvenience or impiety of this mode of trial, still, if it be the right of the appellee, the Court, whatever may be the consequences, will award it to him, unless upon the cases and authorities last cited, they should be of opinion that he is entitled to their judgment that the writ of appeal be quashed, and that he go thereof without day.

Chitty in reply. It is not necessary to discuss the first point made on the other side, because it is admitted

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(a) By the word intentio *Bracton* means the count or declaration. The phrase is taken from the civil law, which it is well known he made his model as far as he was able.

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that the counterplea must bring the case within some of the exceptions. There is no authority for saying that the presumption of guilt must arise from one single fact; for the mainour itself involves many facts, viz. that the property was stolen, its identity, and its being found on the prisoner, and the instances given by *Bracton* are all of a complicated nature, being a collection of circumstances, from the whole of which taken together the guilt is presumed. It is admitted that *Stamford* is a direct authority for the counterplea, but it is contended that his is not good authority: he, however, is an author of considerable weight, and was a Judge, and he is spoken of by Lord *Coke* with the highest approbation. *Pulton* also, who wrote at a subsequent time, and who was himself an author of considerable note, adopts the law as laid down by him. The instances put by *Bracton* are by no means conclusive of guilt, nor are they stronger than the case stated in the counterplea. [Lord *Ellenborough* C. J. Whatever might be the opinion which the Court might now form of such cases, still the Courts then seemed to have considered that they would not admit of denial. You are to bring your case within some of these exceptions; and in order to do so, must you not shew that here there can exist no doubt? *Bayley* J. The instances at that time went beyond the rule. That does not prove the rule to be wrong which was, that battel should only be ousted where there was no doubt of the guilt and at that time these instances went that length.] As to the objection to the form of this counterplea that it does not state the circumstances as facts, but only that they appeared to divers credible witnesses to be so, that has already received an answer, and if it were held to be a good objection, still there would be sufficient left in the counterplea,

terplea, to oust the appellee of his wager of battel. Then as to the replication, there is no authority, which has been quoted, which warrants it; and if the reason given for receiving the counterplea be good, namely, that there is some evident or probable matter, and so something upon which a jury are to determine, that will apply with additional force against admitting this replication as an answer to it, for from the replication there appears to be a contradiction of facts upon which it is peculiarly the province of a jury to decide; so that the very circumstances stated in the replication strongly shew that this case ought to be decided by a jury, and not by the wager of battel. And as to the last point, that the judgment must be that the appellee go without day, the rule was well laid down in *Bowen v. Shapcott*, 1 *East*, 544. "That where one pleads a fact which he knows to be false, and a verdict be against him, the judgment is final; but upon a demurrer to a plea in abatement, there shall be a respondeas ouster, because every man shall not be presumed to know the matter of law which he leaves to the judgment of the Court." And that was a demurrer to a replication to a plea in abatement, which is very similar to this present case. As to the precedent cited from *Rastal*, two answers may be given to it. First, that there a false fact was pleaded, which distinguishes it from the present case: and, secondly, that according to *Fleta*, lib. 1. c. 34. and *Bracton*, lib. 1. c. 20. fol. 140. it appears that an appeal of murder was not sustainable if there had been previously no coroner's inquest. That fact, therefore, appearing on record by the coroner's return in *Rastal*, the Court might well give judgment that the defendant should go without day. But in *Fitzherbert*, pl. 154. where one was appealed of the robbery and said that

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he would defend himself "par son mayn," to which the appellant replied, that he had broken prison; on which a writ was sued to the sheriff who returned the same tardé; upon which the appellee shewed a charter of pardon as to the breaking of prison, and it was allowed: the Court there did not give judgment for the appellee generally, but only that he should wage his battel. At all events, therefore, the Court now will only give judgment in this case that the appellee be allowed his wager of battel.

Lord ELLENBOROUGH C. J. The cases which have been cited in this argument, and the others, to which we ourselves have referred, shew very distinctly that the general mode of trial by law in a case of appeal is by battel, at the election of the appellee, unless the case be brought within certain exceptions. As, for instance, where the appellant is an infant, or a woman, or above sixty years of age, or where the appellee is taken with the mainour, or has broken prison. Now, in addition to all these, there is the case where great and violent presumptions of guilt exist against the appellee, which admit of no denial or proof to the contrary. Without going at length into the discussion of the circumstances disclosed by the counterplea and replication, here it is quite sufficient to say, that this case is not, like those in *Bracton*, one which admits of no denial or proof to the contrary. The consequence therefore must be, that the usual and constitutional mode of trial must take place, unless indeed in respect of the Plaintiff's having, by the counterplea, declined the wager of battel, the judgment of the Court now must be, that the defendant should go without day. Upon which point I pronounce no opinion at present, but wish, if it be necessary, to hear a further argument.

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BAYLEY J. I am of the same opinion. This mode of proceeding, by appeal, is unusual in our law, being brought, not for the benefit of the public, but for that of the party, and being a private suit, wholly under his controul. It ought, therefore, to be watched very narrowly by the Court; for it may take place after trial and acquittal on an indictment at the suit of the king; and the execution under it is entirely at the option of the party suing, whose sole object it may be to obtain a pecuniary satisfaction. One inconvenience attending this mode of proceeding is, that the party who institutes it must be willing, if required, to stake his life in support of his accusation. For the battel is the right of the appellee at his election, unless he be excluded from it by some violent presumption of guilt existing against him. On going through the whole of these proceedings they do not raise in my mind that violent presumption which is by law required to oust the appellee of his wager of battel. Some parts of the counterplea are insufficiently alleged. With respect to those parts of the counterplea where it is stated that certain facts appeared and were manifest to divers credible witnesses, that is, in my opinion not a proper mode of alleging those facts, and therefore the Court ought not to take them into their consideration. On the whole, however, I think that there is not sufficient on the face of these proceedings to justify the Court in refusing the battel. As to the effect which this decision against the counterplea may produce, and what must be ultimately the judgment of the Court, whether that the appellee be allowed his wager of battel or go without day, I have not at present made up my mind. It may be a question to be considered by the appellant whether he wishes any further judgment to be given.

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ABBOTT J. I am of the same opinion, that this counterplea is not sufficient to oust the appellee of his wager of battel. The appeal seems to have been in its origin a challenge, and the party accused was allowed to wage his battel, unless in certain excepted cases: as for instance, where the appellant was an infant, or maimed, or above sixty years of age, or a woman; and perhaps it was for this amongst other reasons that a woman was allowed to appeal only in one case, viz. that of the death of her husband. So in the case of an approver, if the person claiming to be so was a woman, an infant, maimed, or above sixty, he was not allowed to be an approver, and for this reason, that in such cases the defendant would lose his wager of battel. 2 *Hale's P. C.* 233. This shews the nature of this proceeding, as being in its origin a challenge (a), and that the battel was the right of the appellee at his election, unless certain exceptions existed. Then has this appellant brought himself within any of those exceptions which entitle him to decline the wager of battel? It is

(a) This seems to be satisfactorily made out in "An argument for construing largely the right of the appellee to insist on the trial by battle," by *E. A. Kendall, F. A. S.*, third edition, 1818; and the learned writer gives the ancient form of the count from the assizes of *Jerusalem*, by which it clearly appears that the appellor gave the challenge in case the appellee denied the charge made against him. The title of the chapter in the assizes of *Jerusalem* is this: "*Qui veaut faire Apeau de Murtre, et le Murtrier est en la Court present, que il doit faire et dire quant il l'a apelé.*"

The chapter runs thus: "*Qui veaut maintenant faire Apeau de Murtre, d'ome, ou de seme, ou d'enfant, qui ait esté murtri et mostre à Court, si com est devant dit, et celui ou cele que il veaut apeler est present en la Court, il doit faire dire en la Court, par son conseil, 'Sire, tel se clame à vous de tel, qui la est, qui a tel murtri; et se il le noie, il est prest que il en preuve de son cors contre le sien, et que il le rende mort ou recreant en une oure dou jour; et vées ci son gage:'*" et nome tous trois, l'Apeloir et l'Apelé, et le murtri. Lors s'agenouille l'Apeleoir devant le Seignor, et li tent son gage." Assizes et Bons Usages du Royaume de *Jerusalem*; tirés d'un Manuscrit de la Bibliothèque Vaticane. Par *Jean d'Idelin, Comte de Japhe, &c. &c. Paris, 1690.* fol. chap. lxxvii.

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said that he has done so, by pleading a violent presumption of guilt against the appellee. Now as to this the rule is to be found in *Bracton*. The presumption must be strong and vehement, so as not to admit of denial, or proof to the contrary. It must be so strong, vehement, and incapable of contradiction, that the Court might be warranted in awarding execution thereon. It is not necessary to consider whether the instances of the rule put by *Bracton* are or are not of this description, I think they are not. But at the time when *Bracton* wrote they were so considered, and it was on that ground that they were put as instances of the rule. If, therefore, there were no insufficiency in the mode of averring the facts stated in the counterplea, and if all the circumstances there stated were well pleaded, still I should be of opinion that they did not amount to a presumption of the kind mentioned by *Bracton*, namely, one so strong and vehement as to be incapable of contradiction. The defendant therefore is entitled to this his lawful mode of trial. What the consequences of deciding that this counterplea is insufficient may be, the Court will, if necessary, take further time to consider.

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HOLROYD J. I am of the same opinion. The counterplea, either taken alone or coupled with the replication, is not sufficient to oust the appellee of his wager of battel. It appears upon the counterplea that the appellee and *Mary Ashford* were together in the night of the 26th of *May*. There are several circumstances of a suspicious nature, as to what passed between them, stated. It appears that they separated in the course of that night, and that *Mary Ashford* went alone to *Butler's* house. It is not stated that they ever met again. There is no allegation to this effect, nor is there any circum-

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stance stated, inconsistent with the idea that she might have accidentally fallen into the pit through giddiness and loss of blood. All the suspicious circumstances before alluded to might have happened before the separation took place, and then no motive could remain why any murder should have been committed. In addition to this, the replication states an alibi, which affords a strong presumption in favour of the innocence of the appellee, and must be taken conjointly with the counterplea into the consideration of the Court. The judgment of the Court therefore on this demurrer must be with the appellee.

Lord ELLENBOROUGH C. J. The general law of the land is in favour of the wager of battel, and it is our duty to pronounce the law as it is, and not as we may wish it to be. Whatever prejudices therefore may justly exist against this mode of trial, still as it is the law of the land, the Court must pronounce judgment for it.

Gurney then, on the part of the appellant, prayed time for a day or two to consider whether the appellant would wish to have any further argument on the point about which the Court entertained doubts: which was granted.

Lord ELLENBOROUGH C. J. Let there be entered on the record, *curia advisare vult*.

Monday,
April 20th.

And now, *Gurney* appeared for the appellant, and stated that he prayed no further judgment. Whereupon, by consent of both parties, the Court ordered that judgment be stayed on the appeal: and that the appellee be discharged. The proceedings were
 then

then handed over to the crown side of the court, and *Thornton* was immediately arraigned by Mr. *Barlow* on the appeal, at the suit of the king, to which he pleaded instanter "autrefois acquit."

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—
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THORNTON.

The Attorney-General then, being present in court, confessed the plea to be true. Whereupon the Court gave judgment that the appellee should go thereof without day. The appellee was immediately discharged.

BENNETT *against* CLOUGH and Another.

Friday,
 April 9th.

ACTION by plaintiff, a sub-distributor of stamps at *Chorley* in *Lancashire*, against the defendants who were proprietors of a coach running from *Manchester* through *Chorley* and *Preston* to *Carlisle*, for 140*l.* being the value of a parcel which had been sent by that conveyance and which had been lost by the way. The parcel was directed to *Samuel Staniforth, Esq., Liverpool*, (the stamp distributor there,) and contained two Bank post bills of 50*l.* each, 40*l.* in Bank of *England* notes, and some stamps. In the cross-examination of Mr. *Henry Bennett* the plaintiff's son, who proved the value and contents of the parcel, it further appeared, that there was contained in the parcel, a letter sealed and directed to Mr. *Staniforth*, but of the contents of which he could give no account, not having ever seen

A parcel, containing Bank-notes, stamps, and a letter, were sent by a common carrier from one stamp distributor to another: Held, in an action against the carrier, that the circumstance of the letter accompanying the stamps was *prima facie* evidence that it related to them, so as to bring the case within the proviso of the 42 G. 3. c. 81. s. 6., which enacts, that the prohibition to send letters

otherwise than by the post shall not extend to letters sent by any common carrier with and for the purpose of being delivered with the goods that the letter concerns: and that the defendant not having proved the letter to relate to any other subject-matter, was liable for the value of the parcel. *See Wilson v. Dixon. 5 B & C 768.*

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them. *Bayley J.*, who tried the cause at the last assizes for the county of *Lancaster*, thought that this did not prevent the plaintiff from recovering for the value of the parcel, but gave the defendant leave to move to enter a nonsuit if the Court should be of a different opinion. And now

Scarlett moved to enter a nonsuit. The question depends on 42 G. 3. c. 81. by the fifth section of which it is enacted, "that no one shall send any letter or letters, packet or packets of letters otherwise than by the post, or by and with the authority of the Post-Master-General, on pain of forfeiting 5*l.*" It was therefore illegal to send this packet, being within the express prohibition of the act; and the plaintiff cannot recover for its loss, unless in the opinion of the Court it falls within the proviso mentioned in that act. That proviso is, "that the act shall not extend to subject any person to any such penalty or forfeiture as aforesaid, for sending or causing to be sent or conveyed, or for tendering or delivering in order to be sent or conveyed any letter or letters which shall respectively concern goods sent *by any common carrier of goods, and which shall be sent with, and for the purpose of being delivered with the goods that such letter or letters do concern*, without hire or reward, profit or advantage, for the receiving or delivering the same." Now this was not a letter accompanying goods: for the principal contents of the parcel were bank notes, and though there were certainly a few stamps also in it, yet the plaintiff did not seek to recover any thing for them. At any rate it must be a letter concerning the goods to bring it within the proviso, and the plaintiff therefore

ought to have proved this by giving some evidence of its contents, which was not done. But

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The Court thought that the Defendant ought to have given *primâ facie* evidence that the letter did not concern the goods sent in the parcel in order to have laid a foundation for his objection. The parcel contained stamps, and the letter was directed to the stamp distributor at *Liverpool*, the presumption therefore is, that this letter which accompanied the stamps related to them. Illegality is never presumed: on the contrary every thing must be presumed to have been legally done till the contrary is proved.

Rule refused.

BRANDRAM and Others *against* WHARTON.

ACTION by plaintiffs as indorsees, against the defendant as the drawer of a bill of exchange for 1540*l.* of which *Hardy, Otley* and Co. were the acceptors. Plea, 1. General issue. 2. That the cause of action did not accrue within six years, and issues thereon. At the trial before Lord *Ellenborough*, at the *London* sittings after *Michaelmas* term, it appeared in evidence, that the defendant for several years acted as the clerk of *Henry Houghton* and Co. That firm consisting of *Henry Houghton, John Humphreys*, and *Philip Carrick*, who traded as general merchants as

One of two joint drawers of a bill of exchange becomes bankrupt, and under his commission the indorsees prove a debt (beyond the amount of the bill) for goods sold, &c. and they exhibit the bill as a security they then held for their debt, and afterwards receive a dividend: Held,

in an action by the indorsees of the bill against the solvent partner, that the statute of limitations was a good defence, although the dividend had been paid by the assignees of the bankrupt partner within six years.

well

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well as insurance brokers; that in the year 1806, the defendant was admitted into partnership with them as to one fourth of the insurance business only. Both firms however continued to trade under the name of *Henry Houghton and Co.* It appeared further, that in *February*, 1810, *Hardy, Otley and Co.* being indebted to the *Insurance house*, the latter drew the bill of exchange in question upon them, which was duly accepted, and the bill was then indorsed over by *Houghton* to the plaintiffs, who did not then know that there were two distinct houses of *Henry Houghton and Co.*, or that the defendant was a partner in either. Before the bill became due, *Hardy, Otley and Co.* became bankrupts, and in *March*, 1811 a commission of bankruptcy issued also against *Henry Houghton and John Humphreys*, under which the joint estate of the mercantile house was *applied*. The plaintiffs under that commission in proof of a debt, on the 14th *May*, 1811, swore, that *Houghton* and his partners *Humphreys* and *Carrick* were indebted to them in the sum of 2100*l.* upon the balance of accounts, for goods sold and delivered by them to the mercantile house of *Henry Houghton and Co.*, for which they had received no security, except the bill of exchange upon which this action was founded. In respect of the debt thus proved, the plaintiffs had received a dividend within six years before the commencement of the action. Upon these facts, it was insisted on the part of the plaintiffs on the authority of the case of *Jackson v. Fairbank (a)*, that the payment of the dividend by the assignees of *Houghton* was a virtual acknowledgment

(a) 2 *H. Black* 340.

by one of two debtors jointly liable, and was therefore fully sufficient to revive the debt as against the defendant. Lord *Ellenborough* C. J. considered the question very doubtful, and directed the jury to find a verdict for the plaintiff with liberty to the defendant to move to enter a nonsuit: and a rule having accordingly been obtained for that purpose by *Scarlett* in *Hilary* term last,

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Marryatt, *Gurney*, and *Campbell* shewed cause. It is quite clear that a part payment of a debt by a sole debtor will be a sufficient acknowledgment to take the case out of the operation of the statute of limitations. *Whitcomb v. Whiting* (a) went one step further, and decided that a part payment by one of several persons jointly liable will have a similar effect. Then came the case of *Jackson v. Fairbank* (b), which is an authority to shew that the payment of a dividend by the assignees of one joint debtor who has become bankrupt, is sufficient to revive the debt as against the other solvent partners. That case governs the present. Here a dividend has been received by the plaintiffs under *Houghton's* commission upon a debt of 2100*l.*, part of which, viz. 1540*l.*, was secured by this note. In effect, therefore, a dividend has been received upon this note, which was exactly the case of *Jackson v. Fairbank*. It is said that the proof here was a debt for goods sold and delivered, but that is the usual mode of proving a bill of exchange or promissory note. The consideration is first stated, and then an exception is made of the bill or note. The form is given in *Cooke's Bankrupt Laws*, appendix,

(a) *Dougl.* 652.(b) 2 *H. Black.* 340.

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p. 39. The exception is in effect an assertion by the holder of the bill that it is still valid, and an admission of this is made on the other side by the bankrupt, by the payment of the dividend. Then that brings the case to *Whitcomb v. Whiting* of an acknowledgment of the debt by a party jointly liable for it. And the case of *Wood v. Braddick (a)* supports the same principle.

Scarlett and Puller in support of the rule. This is not the case of an acknowledgment within six years of a person jointly liable for the debt; for the dividend paid was paid on a debt for goods sold and delivered, due to the plaintiffs from the mercantile house of *Houghton and Co.*, in which the defendant had no interest. To bring this case within the authority of *Jackson v. Fairbank* the dividend should have been paid on the bill of exchange itself. As to the precedent cited from *Cooke's Bankrupt Laws*, that makes the other way. For where the proof is of a bill of exchange in the hands of an indorsee, which is the case here, the course is not to prove the consideration and except the bill, but to prove the bill itself. (b) It is a well-known rule, that the commissioners of bankrupts will not receive proof of any debt unless accompanied by an exhibit of all the securities which the creditor may hold for it, and he must produce them all, even though the notes or bills of exchange which he so holds may be forged, overdue, or paid. But still these securities do not form the debt proved, nor is the attention of the bankrupt or his assignees called to them specifically: and it would be going very far to say, that the mere production of

(a) 1 Taunt. 104.

(b) *Cooke, B. L. App. p. 41.*

an instrument in compliance with a peremptory rule of law, and to which the bankrupt is not called upon to object, can be taken as an acknowledgment by him that the party producing it has a valid claim in virtue of the instrument so produced. In *Jackson v. Fairbank* the proof was of a debt due upon the note itself: here the debt proved is for goods sold and delivered, and exists wholly independent of the bill of exchange; which is a material distinction between the two cases. There is, therefore, here no acknowledgment within six years of any debt existing on this bill of exchange either by *Houghton* or the defendant, and the debt therefore is barred by the operation of the statute.

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LORD ELLENBOROUGH C.J. This doctrine of rebutting the statute of limitations by an acknowledgment other than that of the party himself, began with the case of *Whitcomb v. Whiting*. (a) By that decision, where however there was an express acknowledgment by the actual payment of a part of the debt by one of the parties liable, I am bound. But that case was full of hardship. For this inconvenience may follow from it; suppose a person liable jointly with thirty or forty others to a debt, he may have actually paid it, may have had in his possession the document by which that payment was proved, but may have lost his receipt: then, though this was one of the very cases which the statute was passed to protect, he may still be bound, and his liability be revived by a random acknowledgment made by some one of the thirty or forty others who may be careless of what mischief he is doing, and

(a) *Doug.* 652.

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who may even not know of the payment which has been made. Beyond that case, therefore, I am not prepared to go, so as to deprive a party of the advantage given him by the statute, by means of an implied acknowledgment. No case can be cited except *Jackson v. Fairbank* (a), where this has been done, and in that case there is wanting one material circumstance which exists in *Whitcomb v. Whiting*, for in the latter case the party who revived the debt by his acknowledgment, became himself liable to contribute to it, but in *Jackson v. Fairbank*, the acknowledgment, besides being a constructive one, was made by parties who never could be called upon for contribution. This case goes still further, for here the party, who in the proof of his debt excepts the security, does it merely in compliance with the requisition of the law, by which he is compelled to except all his securities whether available or otherwise. He produces therefore this bill of exchange amongst the rest, subject to all its accompanying invalidities. This therefore can furnish no sufficient evidence of an acknowledgment, so as to revive a debt otherwise extinguished by the operation of the statute. On the distinction between express and implied acknowledgments, I however found myself, and as no express acknowledgment exists in this case, I think the judgment must be given for the defendant.

BAYLEY J. I think that in this case the defendant's plea of the statute of limitations, has not been answered. The cases cited of *Whitcomb v. Whiting* and *Wood v. Braddick* furnish a very different principle. There

(a) 2 Hen. Black. 340.

the party who was jointly liable made the acknowledgement against his own interest. For he then became himself liable to contribute to the payment of the debt. But here it is quite different. The situation of the party making the acknowledgement is materially altered. He becomes a bankrupt and is no longer liable to contribution. Besides it is by no means clear that he knew that this debt was ever proved against him. How then can he be supposed to have acknowledged a debt, of the proof of which under his commission he may have been wholly ignorant. It is said, indeed, that the plaintiff signed *Houghton's* certificate for the sum of 2100*l.*, and that *Houghton* by accepting it must be considered as having assented to this proof of the debt; but it must be recollected that *Houghton* at that time was materially interested in obtaining his certificate, and in the signature of the plaintiff to a large amount. This case is also distinguishable from that of *Jackson v. Fairbank*, although certainly, for the reasons stated by Lord *Ellenborough*, I should doubt of the propriety of that decision. Here the proof under the commission is for goods sold and delivered. It is indeed assumed that if this bill had not been available against *Wharton*, that it would not have been necessary to except it in the proof of the debt: but this is a fallacy, for suppose that the house in which *Wharton* was interested, had been discharged by the laches of the holder of the bill and that afterwards the mercantile house had promised to pay. Then although *Wharton* would be exempt, still the bill would be a security due from the mercantile house, and it would be necessary to except it in the proof of the debt under the commission. I am, therefore, of opinion

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that in this case the rule for entering a nonsuit should be made absolute.

ABBOTT J. If it were necessary in this case to over-rule *Jackson v. Fairbank*, I should require further time to consider it; although I am by no means satisfied that that was a sound or good decision. This case is, however, not precisely the same as that. The proof there under the commission of bankruptcy was of the same instrument upon which the action was afterwards brought. Here it is not so. The proof here is of a claim for goods sold and delivered, and the bill of exchange is only incidentally introduced. Now there is a material distinction between a case where the instrument is the ground of the claim, and where it is, as here, only incidentally introduced. Where it is the ground of the claim it is the interest both of the bankrupt and his assignees to attend to it, and to examine into the circumstances under which it is produced. But in the other case it is not so necessary; for the introduction or omission of it does not increase or diminish the sum on which the dividends are payable. There being this distinction between this case and *Jackson v. Fairbank*, and not being willing to extend that case any further, I am of opinion that the plaintiff in this case must be nonsuited.

HOLROYD J. I am of the same opinion, that in this case the plaintiff must be nonsuited. The debt proved under the commission was not one to which *Wharton* was a party. It was a debt due from *Houghton* and Co. for goods sold and delivered, and for which this bill had been given as a security. Now whether that
security

security were available or not, still at all events there was the debt due for the goods, on which the same dividend would be receivable. The payment, therefore, of this dividend does not amount either to an actual or virtual acknowledgement that there was any money due on the bill, and therefore cannot take the case out of the operation of the statute.

Rule absolute for entering a nonsuit.

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WHARTON.

SOUTHWOOD, Assignee of J. EDBROOKE, a Bankrupt, against TAYLOR. *Monday, April 13th.*

ACTION by plaintiff, as assignee of *J. Edbrooke*, a bankrupt, for goods sold and delivered, and on the money counts. Plea, non assumpsit, and notice of set-off, that bankrupt before his bankruptcy was indebted to the defendant on a promissory note, &c. At the trial before *Holroyd J.*, at the last assizes for the county of *Somerset*, it appeared that the bankrupt being indebted to the defendant in 100*l.*, in *December 1815* absconded; that early in *February 1816* the bankrupt's effects were put up to sale by auction, and that the defendant purchased at such sale, goods belonging to the bankrupt, for which he afterwards refused to pay, alleging that the bankrupt was indebted to him in a larger sum upon the promissory note. On the 30th *April 1816*, a commission of bankrupt issued, founded upon an act of bankruptcy committed in the preceding *January*, under which the plaintiff was appointed sole assignee. The

A sale of the property of a bankrupt, after an act of bankruptcy, but more than two months before the commission issued, is since the 46 G. 3. c. 101. s. 1. a sale by the bankrupt, and not by the assignee: and a creditor of the bankrupt having become a purchaser, was holden (in an action brought by the assignee for the value of the goods) to be entitled to set off against such claim, the debt due to him from the bankrupt; this constituting a mutual credit between the bankrupt and such creditor within the meaning of the 46 G. 3.

tual credit between the bankrupt and such creditor within the meaning of the 46 G. 3.

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learned Judge thought, that as the sale took place more than two months before the date of the commission, it was to be taken as if there had been no prior act of bankruptcy, and that the defendant was entitled to his set-off. The plaintiff was therefore nonsuited, with liberty to move to enter a verdict, and

Moore now moved accordingly. This is not the subject of set-off; inasmuch as the sale being after an act of bankruptcy, constituted a debt to the assignee, and not to the bankrupt; and therefore the debts are not *mutual*, and for the same reason it does not constitute a *mutual* credit. The 46 G. 3. c. 135. s. 3. does not extend the privilege of set-off, but only applies to cases "where there has been mutual credit, between the *bankrupt* and any other person." The debt therefore must be contracted by, or the credit given to the *bankrupt*: here the debt was contracted to the assignee, and therefore it is a case not within the third section of the statute.

Lord ELLENBOROUGH C. J. The 46 G. 3. c. 135. s. 1. enacts, "that all dealings with any bankrupt which shall have been entered into more than two calendar months before the date of the commission, shall notwithstanding any prior act of bankruptcy be good and effectual to all intents and purposes whatsoever, as if such prior act of bankruptcy had not taken place." Then comes *sect. 3.* which says, that "where there has been mutual credit given by the bankrupt and any other person, or mutual debts between the bankrupt and any other person, one debt or demand may be set-off against another, notwithstanding any prior

prior act of bankruptcy before the credit was given to, or the debt was contracted by such bankrupt, in like manner as if no such prior act of bankruptcy had been committed, provided such credit was given to the bankrupt two months before the issuing of the commission." The first section therefore makes the present sale to all intents and purposes as if no prior act of bankruptcy had existed. In other words it makes it a sale by the bankrupt, and a credit given by him. Then, at the time of the sale there was a mutual credit existing between the defendant and the bankrupt, and then the third section applies and gives the defendant the right of set-off, which he has claimed. The form of declaring as for a sale by the assignee is wrong, for such sale having taken place more than two months before the date of the commission, must be taken as a sale by the bankrupt, and not by the assignee. The declaration should therefore have been in the bankrupt's name, and then it is obvious that the objection taken at the trial could not have been available.

Per Curiam.

Rule refused.

22. Decem. v. Lyon. 2. d. c. 12. 379.

The KING *against* The Inhabitants of CHESHUNT.

*Wednesday,
April 15th.*

TWO justices, by an order, removed *John Blackerby* and his family from the parish of *Waltham Holy Cross* in the county of *Essex*, to the parish of *Cheshunt*

A pauper employed as a labourer by the Board of Ordnance, having previously occupied a

house at an annual rent of 7*l.*, which was then purchased by the Board, still continued to reside in part of the premises, at a weekly rent of 2*s.*, which was deducted out of his wages, and during such last occupation he also occupied a shop (the shop and house together being of the annual value of 10*l.*) and upon his dismissal from his employment he gave up possession of the house as required: Held that his last occupation of the house was not as tenant, but as servant, and that no settlement was thereby gained.

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in the county of *Hertford*. The sessions on appeal confirmed the order, and stated the following case. The pauper *John Blackerby* was a labourer in the employment of the Board of Ordnance, in the gunpowder manufactory at *Waltham Holy Cross*. After residing upwards of two years in a house in that parish at an annual rent of 7*l.*, it was purchased by the Board, and a part of the premises having been taken from it, he continued to live in it at a weekly rent of two shillings, which was deducted from his wages. The Board of Ordnance had several other houses in *Waltham Holy Cross* for their labourers, who paid weekly rents for them, but inhabited them so long only as they continued in the employment of the Board. When the pauper was dismissed from the employment, he was required to give up the key of the house, which he at first refused to do, but after a short time gave it to the person appointed to succeed him in the house by the superintendant. During the time he so held this house at 2*s.* a week, he also occupied, for a space of time exceeding forty days, a shop in the same parish, the shop and the house together being of the annual value of 10*l.* The court of quarter sessions were of opinion that the occupation of the house under the above circumstances did not operate in aid to confer a settlement within the meaning of the 13 & 14 *Car. 2. c. 12.*

Jessopp and *Kelly*, in support of the order of sessions, contended, that this was not a coming to settle within the meaning of 13 and 14 *Car. 2.* The pauper occupied the cottage only during the time he continued in the employment of the Board of Ordnance. This was only for the more convenient performance of his service;

vice; and the relation of landlord and tenant never existed, which, according to the decisions, has uniformly been held to be requisite, The only difficulty arises out of the words weekly rent: this is, however, an incorrect expression, and wholly inconsistent with the other parts of the case; and it is, besides, observable, that the weekly rent, as it is called, was to be deducted out of his wages. It is, therefore, quite clear that the only relation which subsisted between these parties was that of master and servant, and not that of landlord and tenant; and they cited *Bertie v. Beaumont*. (a)

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Knox and Walford, contra. The sessions in this case have not found that the relation of landlord and tenant did not subsist, but only that the occupation of the house under the circumstances was not within the statute 13 and 14 Car. 2. In this case the tenement is found to be of a sufficient annual value; and there is the circumstance of a weekly rent, payable to the master, which makes this case stronger than the case of *Rex v. Melkridge* (b), to which, in other respects, this case bears a strong resemblance. For there the pauper, who was the head to a body of persons, as a reward for his service, had the occupation of a house of 10*l.* annual value, and the Court held that sufficient to confer a settlement; and the circumstance of the pauper's quitting the house when he quitted the service, is by no means conclusive; for it might be a convenience to the pauper to leave the house when he was employed elsewhere. It is admitted that for the first two years

(a) 16 East, 33.

(b) 1 T. R. 598.

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he occupied this house as tenant, at a rent of 7^{l.}, and no alteration appears to have been made subsequently, except in the rent, which is accounted for by the fact of a part of the premises being taken down; and they cited *Rex v. Minster. (a)*

Lord ELLENBOROUGH C. J. In this case it seems to me that the party occupied this house as a servant only, and not in the character of a tenant. It is like the case of a coachman, who frequently occupies a room over the stables; but such occupation is *not* within the meaning of 13 and 14 Car. 2. The pauper here was divested of the tenement as soon as his service terminated. He quitted the possession reluctantly, and was succeeded by the person who succeeded him in his employment under the Board of Ordnance. All this clearly shews that he was only entitled to hold it during and for the more convenient performance of his service. If the Court should hold, in this and similar cases, that the legal relation of landlord and tenant subsisted, it would become necessary to turn such persons out of possession by the regular proceedings in ejectment, and every gentleman having twenty or thirty cottages in which his labourers resided, would be compelled on any change of their service to have recourse to such means. This would be productive of the most serious inconvenience. Upon the whole view of this case, I think it plainly appears that the relation of landlord and tenant never did subsist here, and unless that were so, this was not an occupation within 13 & 14 Car. 2., and no settlement could be gained by it.

(a) 3 M. & S. 276.

BAYLEY J. I am of the same opinion. The case of *The King v. Minster* only decided that the occupation of a tenement which was wholly unconnected with the service would confer a settlement, but that the occupation of one connected with the service would not. In this case the tenement is connected with the pauper's service under the Board of Ordnance.

ABBOTT J. If the case had stated, instead of using the words weekly rent, that the pauper lived in the house, and received 18s. and not 20s. per week wages, there would have been no doubt. And I consider that in substance it is so stated. Here the relation which existed was only that of master and servant, and not that of landlord and tenant.

HOLROYD J. concurred.

Order of Sessions confirmed.

The KING *against* The Inhabitants of OADBY.

Wednesday,
April 15th.

UPON an appeal against an order of two justices, by which *Peter Howard* and *Sarah* his wife were removed from the parish of *Oadby* in the county of *Leicester*, to the parish of *Humberstone* in the same county, the sessions discharged the order subject to the opinion of this court, on the following case:

Peter Howard, a poor child of the parish of *Evington* in the county of *Leicester*, by an indenture executed by himself, his father, and *John Lander* his master, bound himself an apprentice to *John Lander* of *Humberstone*,

The premium given by the parish officers upon the binding out of a poor apprentice need not be set out in the indenture in words at length; such an indenture being exempted from any duty by 8 *Anno*, c. 9. s. 40., and the insertion of the premium being required

for no other purpose but to ascertain the amount of the duty.
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for seven years. The parish officers of *Evington*, paid all the expences of the binding, and gave the master a premium of one guinea. The expences and the premium were paid out of the poor rates of the parish of *Evington*. The premium is not mentioned or inserted in words at length (but is entirely omitted) in the indenture.

The question is, whether the indenture is, or is not void on account of that omission.

Grant and *Marriott*, in support of the order of sessions. This question depends on the construction of the 8 *Anne*, c. 9. s. 39. by which it is enacted, that all indentures of apprenticeship, wherein shall not be truly inserted and written the full sum received with the apprentice, or whereupon the duties payable by that act, shall not be duly paid, or which shall not be stamped according to the tenor of that act, shall be void. The fortieth section states, that nothing in that act contained, shall be construed to extend to charge any master with the payment of the said duties, in respect of any money received with any apprentice placed out by the parish or any public charity, or to require the stamping of the indenture in such cases. This latter section therefore, has clearly repealed the former section as to two of its requisites, viz. the payment of the duty, and the stamping; but it has left untouched the third, viz. the inserting in the indenture the sum paid with the apprentice. And there might be good reason why this should be so, for there are several acts of parliament, which give to magistrates a power of interference in cases where the sum paid with the apprentice does not exceed 5*l.*, as for instance 32 G. 3. c. 57., and that act distinctly speaks of parish apprentices. So that it might be extremely convenient that

that the justices before whom the apprentice is brought, should see upon the face of the indenture, whether they had jurisdiction or not. In many cases, the magistrates have power to award the apprentice's fee to be returned, as was done in the case of *Rex v. Johnson (a)*, and *Rex v. Vandeleer (b)*, which affords another reason why the legislature might choose to leave that provision of the thirty-ninth section unrepealed by the fortieth.

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tants of
OADEY.

Lord ELLENBOROUGH C. J. There is not any other statute which requires the insertion of the premium paid with the apprentice, except this act of the 8 *Anne*, the fortieth section of which, exempts indentures like that in this case, both from the payment of the duty and the stamp. Now for what purpose could the insertion of the sum paid be required, except for the purpose of calculating the duty payable thereon? If indeed the legislature had stated in this act, any other purpose than that of increasing the revenue, there would have been some foundation for the argument addressed to the Court, and there is rarely such a penury of words in acts of parliament as could induce me to think that, if they had any other object in view, the legislature would not in some corner of some clause of the act have expressed their intention. No trace however of any other purpose is to be found. Then, can we say, when no reason exists for which the insertion in the indenture of the sum paid with the apprentice should be required, still that such insertion is necessary, and that without it the indenture must be

(a) 1 *Salh.* 68.(b) 1 *Strange*, 69.

void?

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tants of
QADBY.

void? I think, therefore, that in this case the sessions have come to a wrong conclusion, and that their order must be quashed.

BAYLEY J. I am entirely of the same opinion. This is a revenue act and contains no provisions except those relating to duties. It is entitled "an act for laying certain duties upon candles, and certain rates upon monies paid with clerks and apprentices." Then although the thirty-ninth section in terms requires the sum paid with the apprentice to be inserted in the indenture, yet that is only for the purpose of raising a duty thereon. When, therefore, the fortieth clause exempts parish indentures from the payment of these duties it entirely supersedes the necessity of inserting the sum paid in the indenture, and therefore the reason for the provision ceasing, the provision itself ceases to be necessary. I think, therefore, that this was a valid indenture, and that the sessions were wrong in deciding against it.

ABBOTT J. The Court ought not, without seeing their way clearly, to hold this to be a good objection to the validity of an indenture, for it may involve questions of considerable importance, such as the freedom of a corporation, and the following of a profession. The only object of this provision in the clause was to insure the payment of the duty. Where no duty, therefore, is payable, which is the case here, that reason exists no longer, and the provision itself becomes unnecessary.

HOLROYD J. concurred.

Scarlett, Phillips, and Francklin were to have argued against the order of sessions.

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The KING *against* The Inhabitants of ST. JOHN,
in GLASTONBURY.

TWO justices by their order removed *Job Davis, Jane* his wife, and their two children, from the parish of *Saint John* in *Glastonbury* in the county of *Somerset*, to the parish of *South Petherton* in the same county. The sessions, on appeal, quashed the order, subject to the opinion of this Court on the following case:

Job Davis the pauper was born in the parish of *South Petherton*, where his parents were legally settled. In 1811 he went to live in the parish of *Saint John the Baptist* in *Glastonbury*, and there occupied for more than forty days a house and two pieces of potatoe ground which he rented of three different persons of the respective yearly value of 5*l.*, 2*l.*, and 2*l.* 10*s.* amounting together to 9*l.* 10*s.* In addition to the property so rented, he at the same time occupied a piece of freehold land of his own, legally conveyed to him, which he had purchased for 10*l.* and built upon, of the yearly value of 1*l.* 10*s.*; but before the order of removal was made, he sold and gave it up. The house and potatoe ground rented by the pauper not being alone of sufficient value to confer a settlement, the question submitted to the Court of King's Bench is, whether the sessions were right in determining that the yearly value of the freehold land being the property of the pauper might be added to the yearly value of that which he so rented so as to settle the pauper and his family in the parish of *Saint John the Baptist* where they had become chargeable before their removal.

A pauper, by occupying a freehold estate of his own, and also other lands as tenant, the whole being of the aggregate annual value of 10*l.* does not thereby gain a settlement, it being necessary under the 13 & 14 Car. 2. c. 12. that he should come to settle on all the property in the character of tenant.

Moore

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—
The KING
against
The Inhabi-
tants of
ST. JOHN, in
GLASTONBURY.

Moore and Adam, in support of the order of sessions. The question is, whether freehold property can unite with that which a party holds in the character of tenant, so that if the aggregate annual value be above 10*l.*, he may gain a settlement by residing thereon forty days. In *R. v. Dorrington (a)*, the pauper occupied one estate of the value of 9*l.* per annum in the character of tenant, and having married the widow of the owner of another cottage of the value of 30*s.*, resided there above forty days, and it was held that he gained a settlement. And in *R. v. Culmstock (b)*, where the pauper was possessed of lands of the annual value of 10*l.* in *Culmstock*, and afterwards occupied a cottage in *Thorn St. Margaret's* for forty days, under an agreement for the purchase of it, there was a similar decision. Those cases are strong authorities in support of the present order; for there, as here, there was an occupation as tenant of one part, and an occupation of the other part not in that character. The only authority to be relied on by the other side is *The King v. Bowness (c)*, as to which it may be observed that there this point came only incidentally before the Court, and was not the main ground of the decision; for there, the party had not occupied the tenement for the space of forty days, which was a decisive objection to the settlement. And besides, the cases of *R. v. Dorrington*, and *R. v. Culmstock* were not then cited to the Court in the argument. In *R. v. South Bemflect (d)* the Court took a distinction, that there the freehold estate was not occupied by the pauper, but was let by him to another tenant. But that case

(a) *Burr. S. C.* 744.(b) 6 *T. R.* 730.(c) 4 *M. & S.* 210.(d) 1 *M. & S.* 154.

shews that if, as here, he had occupied both at once he would have gained a settlement.

C. F. Williams and *Erskine*, contra. The occupation of both tenements must be in the character of tenant. The words of 13 & 14 Car. 2. c. 12. are, that it shall be lawful for two justices to remove persons coming to settle on any tenement under the yearly value of ten pounds, if likely to be chargeable. The statute therefore which gave the two justices a power to remove from a tenement of less value than 10*l.* per annum, must have contemplated such a species of tenement as a man might by law be removed from, if of less than that value. Now it is quite clear, that no one at that time could be removed from his own property, whatever its annual value, if he had it by descent, or if by purchase, till 9 G. 1., by which it first became necessary that the purchase should be to the amount of 30*l.* The consequence is, that a man's own property could not be the species of tenement contemplated by 13 & 14 Car. 2. If so, it cannot unite with the property which is within that statute, viz. the property which the pauper in this case occupied as tenant. This was expressly so ruled by Lord *Ellenborough* in *R. v. Bowness*. And it was not an obiter dictum, for the decision of that case mainly depended on it; and though the other Judges assigned additional reasons for the decision there, they did not express any doubts of the propriety of the law laid down. They also referred to the observations of *Lawrence J.* in *R. v. Martley (a)*, and to the case of *R. v. South Lynn. (b)*

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(a) 5 East, 44.

(b) 5 T.R. 664

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LORD ELLENBOROUGH C. J. The argument in this case has brought back to my mind the decision in *The King v. Bowness*. I think that the coming to settle in the 12 & 14 Car. 2. must mean a coming to settle as tenant; the act having said, that persons who shall come to settle on a tenement of the value of 10*l.* shall not be removeable, must be construed to imply that they shall be removeable if the tenement be of less value. Now it is clear that at that time a man was not removeable who resided on a tenement of less value than 10*l.*, if that tenement were his own property: the legislature therefore could not have contemplated a residence on a man's own property, when they used the words, coming to settle on a tenement. What is reported to have fallen from me in *Rex v. Bowness*, was certainly not to be considered as an obiter dictum, but is confirmed by the authority of Lord Kenyon and Mr. J. Lawrence in the cases cited.

BAYLEY J. I am of the same opinion. It appears from 13 & 14 Car. 2., that the party may be removed, if he comes to settle on a tenement of less than 10*l.* yearly value; but that if it be of that yearly value he cannot. Then the legislature must by the word tenement, have contemplated a description of property, from which, if of less than 10*l.* yearly value, a party could be removed; now if the property were his own, he could not at that time have been removed from it, however small its value: and therefore it seems to me, that this is not a tenement within the meaning of 13 & 14 Car. 2. This is strongly illustrated by the 9 & 10 W. 3. c. 11.: one of the means given by that act, by which a certificate may be put an end to, is by
 14 taking

taking a lease of a tenement of the value of 10*l.*; from which it may fairly be inferred, that the legislature thought the 13 & 14 *Car. 2. c. 12.* applied to leaseholders and not to freeholders. I am therefore of opinion, that in this case the two tenements cannot unite so as to give the pauper a legal settlement in the parish of *St. John in Glastonbury.*

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ABBOTT J. My first opinion was, that the estate, which the pauper occupied as his own, and that which he occupied as tenant, would have united so as to confer a settlement, if they were jointly of the annual value of 10*l.* But the argument has satisfied me that they cannot; and that the coming to settle, as used in the statute, means a coming to settle in the character of a tenant.

HOLROYD J. I own that upon this case I have entertained considerable doubts, which are not entirely removed. The statute says, that no person coming to settle on a tenement of the value of 10*l.* shall be removeable. That is certainly saying by implication, that he may be removed if the tenement be of less value. Now a person cannot be removed from his own property of whatever value it may be, and therefore it should seem that the statute does not apply to a man's own property. But my doubt arises from this, I consider that the statute meant to enact, that when a man resided forty days on property where he was entitled to reside, he should gain a settlement. Now here the party did reside forty days, and was irremoveable all that time. I am, therefore, rather inclined to think that by so doing he did gain a settlement.

Order of sessions quashed.

1818.

Thursday,
April 16th.

PICKMAN *against* ROBSON.

Scire facias
quashed by
plaintiff before
plea pleaded
upon payment
of costs only.

COMYN having on a former day obtained a rule nisi for setting aside a scire facias which had been erroneously directed to the sheriff of *Surrey* instead of the sheriff of *London* where the original action had been brought,

Long now shewed cause, and contended that it should be set aside only on payment of costs, the defendant having entered an appearance to the scire facias; and he cited *Pocklington v. Peck*. (a)

Comyn, for the plaintiff. In *Poole v. Broadfield* (b), the Court of C. P. expressly held, that plaintiff might quash his own writ before plea pleaded, without costs; and in *Tidd's Practice*, 1142. that is stated to be the practice of the Common Pleas: and it is very desirable that the practice of the two courts should not vary.

The Court said, that as the defendant had been put to expence by plaintiff's error, it was reasonable that the defendant should be paid the costs thereby incurred, and the rule was made

Absolute upon payment of costs.

(a) 1 *Str.* 638.

(b) *Barnes*, 431.

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BECKWITH *against* WOOD and Another.*Thursday,*
April 16th.

ACTION on the 1 G. 2. st. 2. c. 5. s. 6. against the defendants, two inhabitant householders of the city of *London*, for a reparation in damages by reason of the beginning to demolish the dwelling-house of the plaintiff, and damaging and taking away a large quantity of fire-arms by persons unlawfully, riotously, and tumultuously assembled. Plea not guilty. At the trial at the *London* sittings after last *Michaelmas* term, it appeared in evidence that the plaintiff was a gun and pistol manufacturer in *Skinner-street*, and that on the 2d day of *December* 1815, seven men, one of whom apparently acted as the leader, and held in his hand a pistol, entered the plaintiff's shop and demanded *arms*; that one *Platt*, a customer, who at that time was accidentally in the shop, remonstrated with the person so acting as leader on the impropriety of his conduct, when the latter fired his pistol and wounded *Platt*. The leader was secured and taken to the upper apartments, his followers having quitted him when the pistol was fired; they soon, however, returned, accompanied by a mob of four or five hundred persons; the mob insisted that the person so confined should be released, and threatened, in case of refusal, to pull the house down: they then entered the house and proceeded to break the windows, window-frames, and glass presses in which the different articles stood, and for that purpose they used the *butt-ends of the guns* which they

Where the leader of a mob, having entered a gunsmith's shop and demanded arms, was detained, and the mob then declared that unless he were released they would pull the house down, and they did enter and break the windows, window-frames, &c., and for that purpose used some of the arms found in the shop, and carried away others: Held, that this was evidence of a purpose to demolish the house, and that the owner might recover against the hundred a reparation in damages for the injury done to the house itself, and to the arms actually used in the act of demolishing; but that he was not entitled to recover for the value of the arms carried away, that being a substantive and distinct felony, and therefore not within the stat. 1 G. 2. st. 2. c. 5.

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 BACKWITB
 against
 WOOD.

found in the shop; they left behind a great number which had been thus damaged and spoiled, and carried away others: and it was sworn by several witnesses, that they believed the house would have been pulled down, if the mob had not succeeded in their purpose of liberating their leader. The jury by the direction of Lord *Ellenborough*, found specifically 64*l.* for the damage done to the house itself, 30*5l.* for the damage done to the guns left behind, and 91*1l.* for those that were carried away, but they further found that all the damage was done in prosecution of the purpose of demolition.

Knowlts in *Hilary* term moved for a new trial, on the ground that the purpose of the mob, was not to demolish the house, but to procure arms; for the leader first called for arms, and his followers afterwards stripped the premises of all they could find, and if the main purpose of the mob was the collection of the arms, and not the demolition of the house, then it was clearly a case not within the statute: *Burrows v. Wright* (a) and *Greasley v. Higginbottom*. (b) But at all events, the taking away of the arms, in respect of which the jury have given 91*1l.* damages, was a distinct felony of itself, and therefore the plaintiff could not recover for that loss upon the authority of the former cases, and the damages must be accordingly reduced.

LORD ELLENBOROUGH C. J. It was in evidence, that the purpose of pulling down the house was loudly proclaimed by several of the mob; there was therefore a disclosure of a purpose co-extensive with the utmost

(a) 1 East, 615.

(b) *Id.* 636.

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mischief contemplated by the legislature. As far as the damage to the house is concerned, the case is clearly within the act, and *Greasley v. Higginbottom*, is an express authority to shew that the plaintiffs are then entitled to recover as well for the injury to the house, as for the loss they have sustained by the damage done to the arms which were used for the purpose of demolition. The other point however is very fit to be considered, and the Court therefore will grant the rule to reduce the damages; but not for the new trial.

Garney and Bolland now shewed cause. This being a remedial law, is to be construed liberally. The demolition of the house was principally effected by means of the arms found upon the premises; the inference, therefore, is, that all the arms, as well those that were left upon the premises, as those that were carried away, were taken originally for the same purpose; and if they were so taken, then it would not constitute a distinct and substantive act of felony. In *Greasley v. Higginbottom* the flour, from its nature, could not be used for the purpose of demolition; but here the arms might be, and some were actually so used: then, inasmuch as the arms might be taken originally for the purpose of demolition, (in which case the subsequent change of purpose would not make the original taking felonious;) and as the jury have found that the whole damage was done in prosecution of that purpose, the taking away of the arms in this case did not constitute a felony, but a mere trespass; and then the case falls within the object of the act of parliament, which was to give to the party injured the same remedy which (before the passing of the act) he would have had against the individuals committing the trespass.

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Knowlys and *Tindal*, contra, were stopped by the Court.

LORD ELLENBOROUGH C. J. The statute in this case substitutes a remedy against the hundred in the place of the remedy given by the law against the original trespassers; where the law, therefore, gave no such remedy the statute can have no operation. Now what remedy was there, in the case of a felonious taking, against the party committing the felony? The injured party might indeed prosecute, but could have no remedy by action, and that being so, he cannot by the statute have a remedy against the hundred. Here there was a distinct felony: the arms were carried away in a tumultuous manner, and it was the interest of the persons who took them not to injure them; for they meant to use them in their proper and usual way. Under these circumstances, I am of opinion that the plaintiff cannot recover against the hundred for the value of the arms thus stolen; and consequently that the verdict must be to that extent reduced. The finding of the jury, that all the damage was done in the course of demolition, can make no difference; for there was no evidence on which such a verdict could be legally founded.

BAYLEY J. I am of the same opinion. This is a case of a distinct felony; before the statute passed no action could have been brought against the individuals concerned in it; and consequently no action can now be brought against the hundred. I cannot distinguish this case from that of *Greasley v. Higginbottom*.

ABBOTT

ABBOTT J. The taking of the arms here was as complete a felony as the selling of the flour was in *Greasley v. Higginbottom*, from which I cannot distinguish this case. I think that case was rightly determined; and therefore that this verdict must be reduced.

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HOLROYD J. I am of the same opinion. The circumstance of these arms having been carried away, shews that the original purpose was felonious. Those which were taken for the purpose of demolition, would naturally be left behind after that purpose had been accomplished; and in fact some of them were so left, and for these the plaintiff has recovered: but this shews, that the others which were not left, were taken away for the purpose of appropriation, which makes it a felony, and then the hundred are not liable.

Rule absolute. (a)

(a) But now see 57 G. 3. c. 19. s. 38.

The Overseers of ST. MARTIN-IN-THE-FIELDS
against WARREN.

Friday,
April 17th.

DEBT on bond dated 6th July, 1812. Plea, that defendant became bankrupt on the 28th day of November, 1815, and that the cause of action accrued before he so became bankrupt; on which issue was joined. The cause came on to be tried before Mr. Justice Bayley, at the sittings at *Westminster* after *Trinity* term 1817, when a verdict was found for the plaintiffs, and damages were, by the jury, assessed at the sum of 14*l.* 16*s.* subject to the opinion of the Court on the following case:

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The obligee in a bastardy-bond after the bond had been forfeited, became bankrupt and obtained his certificate; Held, that the parish officers were not thereby precluded from recovering upon the bond further expences incurred subsequently to the bankruptcy.

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The bond was executed by the defendant in the penal sum of 100*l.* subject to a certain condition, whereby, after reciting that *Ursula Ladd*, single woman, did, in an examination taken in writing upon oath before *R. B.*, Esq. one of His Majesty's justices of the peace, &c., acting, &c., declare that she was on the 18th day of *May* then last delivered in the *Bayswater* hospital (licensed for the reception of pregnant women) of a male bastard child, baptized *William*, yet living, and then chargeable to the said parish of *Saint Martin-in-the-Fields*, and that the therein-mentioned *J. L.* was the true and only father thereof, and no man else; and that the aforesaid then churchwardens and overseers of the poor had requested security to indemnify their said parish of and from the maintenance and provision of the said male bastard child; and that the therein-mentioned *J. L.*, and the said defendant, and *F. W. B.* had undertaken to be security, and to save harmless and keep indemnified the said parish of and from the maintenance and provision of the said child, and had requested and desired the said then churchwardens and overseers of the poor to accept and take that their bond for the performance thereof. It was declared, that if the said *J. L.*, and the said defendant, and *F. W. B.*, or either of them, their or either of their heirs, executors, or administrators, did and should from time to time, and at all times thereafter, well and sufficiently save, defend, and keep harmless and indemnified the said then churchwardens, &c. and their successors, the churchwardens, &c. for the time being, as also all other the inhabitants of the said parish, from and against all and all manner of costs, charges, taxes, rates, assessments, and expences whatsoever, which they, either, or any of them, should

or might happen to bear, pay, sustain, or be put unto, for or by reason, or means, or on account of the maintenance and provision of the said child, and of and from all actions, &c. touching or concerning the same, then the said obligation should be void, &c.

The defendant proved that a commission of bankruptcy issued against him on the 28th day of *November*, 1815, and that the bond had been forfeited, and the condition of the bond had been broken, before that time, and that his certificate was allowed on the 23d day of *February*, 1816. It was proved by the plaintiffs that they had expended the sum of 14*l.* 16*s.* in the maintenance of the child in question, from the said 28th day of *November*, 1815, to the 5th of *May*, 1817. The question for the opinion of the Court is, whether this ground of action is barred by the bankruptcy and certificate of the defendant. If the Court shall be of opinion that the plaintiffs are entitled to recover, the verdict is to stand; otherwise a nonsuit is to be entered for the defendant.

Taddy, for the plaintiffs. This is only a contingent debt, and therefore not proveable under the commission. In *Tully v. Sparkes* (a), which was the case of an annuity bond (now provided for by the 49 G. 3. c. 121. s. 17.) the Court of King's Bench, before that statute, decided, in a case where the bond was forfeited before the bankruptcy, that the value of the annuity was a debt proveable under the commission, on the ground that the penalty was the debt at law. The penalty, however, is not the debt proveable under the commission; for the

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(a) 2 *Ld. Raym.* 1546.

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21 *Jac. 1. c. 19. s. 9.* expressly provides, "that creditors having securities by specialty, with or without penalty, shall not be relieved upon such specialties for any more than a rateable part of their just and true debts with the other creditors of the bankrupt without respect to any such penalty." Although the penalty is, therefore, for some purposes the legal debt, it is not so for the purpose of proof under a commission of bankruptcy: all that could be proved was the just and true debt then due, which was the amount of the expence then actually incurred in the maintenance of the child; by such proof the bond is not entirely discharged, but only pro tanto, and expences subsequently incurred are of course the proper subject of an action. And in *Millen v. Whittenbury (a)*, a promise to allow a weekly sum for the support of an illegitimate child, was held not to be discharged by bankruptcy. But the penalty cannot be the debt proveable under the commission on another ground, because, by allowing the overseers to prove the penalty, they might recover more than an indemnity, which is contrary to the policy of the law, as they would thereby have an interest in abridging the life of the child whom it is their duty to protect; and that principle governed the case of *Cole v. Gower (b)*, and was subsequently acted upon in *Townson v. Wilson. (c)*

Chitty, contra. The penalty in a bastardy bond is the debt; for in an action on such a bond, the Court will stay the proceedings on payment of the penalty and costs. *Wilde v. Clarkson. (d)* And in a late case of

(a) 1 *Campb.* 428.(b) 6 *East*, 110.(c) 1 *Campb.* 396.(d) 6 *T. R.* 303.

Shutt v. Procter (a), the Court of Common Pleas stayed the proceedings in such an action, although it was urged on the authority of *Cole v. Gower*, and *Townson v. Wilson*, that by so doing the very mischief contemplated in those cases would be created; for if the whole penalty be paid upon the action, it is the same as if it had been paid in the first instance. And in *Ex parte Day* (b), it was held, that although a bond to secure the re-transfer of stock and the payment of dividends did not necessarily constitute a debt proveable under the commission, yet if the bond be forfeited before the bankruptcy, the creditor should be permitted to prove for the amount of the dividends due before the bankruptcy, and the value of the stock at the date of the commission, by analogy to the case of annuities. These cases shew therefore that the penalty is the debt; and if so, it was proveable under the commission, and the bond is discharged by the bankruptcy.

LORD ELLENBOROUGH C. J. This was a debt upon a contingency, and one too in its nature wholly incapable of valuation, and therefore in my opinion not proveable under the commission. The case of an annuity is an exception to the general rule: there indeed the courts have omitted the amount of the contingent debt to be valued and proved; but there, you only estimate the duration of life: here, the expences for which the party is liable, may vary in consequence of the sickness of the child; the contingency here is not only the duration of life, but on the continuance of health; it is subjected to every accident of human life, and is a most

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(a) 2 Marsh. 227.

(b) 7 Ves. jun. 301.

precarious

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precarious and uncertain event possible; how then could its value be estimated so as to be proved under the commission. In *Goddard v. Vander Heyden* (a), Lord C. J. De Grey says, that debts payable on a contingency which may possibly never happen, cannot be proved under a commission of bankruptcy. But independently of this, I think that there is considerable weight in the argument raised out of *Cole v. Gower*. (b) The permitting of this debt to be proved under the commission would certainly have a tendency to corrupt the parish officers, inasmuch as it would give them an interest in the abridgment of the life of the illegitimate child committed to their care. It is said, that that case has been shaken by, a late decision in the Court of Common Pleas; I shall however require much argument to convince me that that case has been well decided. At present, I adhere to the opinion I expressed in *Cole v. Gower*.

BAYLEY J. I am of the same opinion on both grounds. There is much subtlety in considering the penalty as the debt where the bond is forfeited; but in those cases you prove only the real value of the debt, and there is no case where the proof of a debt perfectly uncertain in its value has been admitted. This is a debt wholly incapable of valuation; its amount depends on the life of the child, the continuance of its health, and the ability of the father to maintain it. On the other ground of public policy, I think that this debt could not be proved under the commission: we are to look at the statute; it permits a bond to be taken for the

(a) 3 *Willson*, 270.(b) 6 *East*, 210.

purpose of indemnifying the parish. The payment of a gross sum however is not an indemnity; and the hazard pointed out by Lord *Ellenborough* immediately occurs, that in such cases it becomes the interest of the parish officers to be negligent of the child. As to the case cited from the Common Pleas, I doubt its authority, as far as it in any respect impugns the doctrine laid down by this Court in *Cole v. Gower*.

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ABBOTT J. I am clearly of opinion on the first ground, that the debt, which it was impossible to value, could not be proved under the commission. On the second ground, I fully accede to the doctrine laid down by this Court in the case of *Cole v. Gower*.

HOLROYD J. I am of the same opinion, that this debt could not be proved. The only thing proveable under the commission, where the penalty is considered as the debt, is the amount of the injury sustained by the breach of the condition of the bond. In a case, therefore, where this cannot be estimated, you cannot prove under the commission. I am also of opinion, that there is much weight in the objection on the other ground.

Judgment for Plaintiff.

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Friday,
April 17th.

CLIFFORD *against* WICKS and TOWNSEND.

A grant of part of the chancel of a church by a lay impropriator to A., his heirs and assigns, is not valid in law. And therefore such grantee, or those claiming under him, cannot maintain trespass for pulling down his or their pews, there erected.

TRESPASS, for breaking and entering a close of the plaintiff, situate in the parish of *Frampton-upon-Severn* in the county of *Gloucester*, being the upper part or corner of the chancel belonging to the parish church of the said parish, at the south-east end thereof above the ascent there, containing from north to south divers, to wit, twelve feet, and from the east to the ascent westward divers, to wit, eight feet, and pulling down and destroying part of a moveable seat or pew belonging to the plaintiff, then standing thereon, and removing from the said close a certain other part of the said seat. The second count stated a similar trespass on another close in the chancel. Plea, 1st, Not guilty; whereupon issue was joined; and, 2dly, *Liberum tenementum* in the defendant *Ann Wicks*; whereupon issue was also joined. The cause was tried at the *Gloucestershire* summer assizes, and a verdict taken for the plaintiff, subject to the opinion of this Court on the following case:

By indenture of feoffment of the 17th June, 13th Cha. 2d, made between *Edmund Clifford* of *Buckinghamshire*, Esq. of the one part, and *Edward Haynes* of *Frampton-upon-Severn* aforesaid, gentleman, of the other part, the said *E. Clifford*, in consideration of many services and of the sum of two shillings, did enfeoff unto the said *Edward Haynes*, his heirs and assigns for ever, the pieces of the chancel mentioned in the first and second counts, by the description contained in the declaration,

together with free liberty to erect and build seats thereupon, and to make and dig sepulchres or burying-places therein, without any fine, mortuary, or pit heriot to be paid for the same, (which said premises were then in the possession of the said *E. Clifford*, as rector and patron of the church;) to hold the same unto the said *Edward Haynes*, his heirs and assigns for ever, to the use of the said *Edward Haynes*, his heirs and assigns for evermore. By indenture of feoffment of the 14th April 1760, made between *Edward Gardner* and others, the representatives of the said *Edward Haynes*, deceased, of the one part, and *Richard Clutterbuck* of *Frampton-upon-Severn*, Esq. of the other part, the said *Edward Gardner* and others, in consideration of five shillings, and for other consideration, did enfeoff unto the said *R. Clutterbuck*, his heirs and assigns for ever, the said two closes of ground and premises comprised in the before-mentioned indenture of feoffment, upon the latter whereof a seat had been then many years erected and built by the said *Edward Haynes*, and then stood; to hold the same to the said *R. Clutterbuck*, his heirs and assigns for ever, to the use of the said *R. Clutterbuck*, his heirs and assigns for evermore.

The present plaintiff, *Nathaniel Clifford*, is the nephew and heir at law of *Elizabeth Phillips*, who was the niece and heir at law of the said *R. Clutterbuck*. *Richard Clutterbuck* was the proprietor of *Frampton Court-house*, of which the plaintiff is the present proprietor. Upon the close of ground first described in the before-mentioned feoffments as lying at the south-east end of the chancel, and which is the close mentioned in the first count, there stood, at the time of the trespass complained

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complained of, a moveable seat; the husbandry servants, and some of the tenants of Mr. *Clifford* the plaintiff, have been used to sit in this moveable seat: *Edward Haynes*, the feoffee in the first feoffment, and his widow, and their daughter and grand-daughter, and the children of the widow by another husband, were buried in the chancel, upon the piece of ground mentioned in the first count. On the 18th *December*, 1816, the defendant *Townsend*, by the direction of the other defendant *Anne Wicks*, entered upon the part of the chancel where this moveable seat was standing, and cut away part of it, which he threw into the centre of the chancel, and dragged away the remaining part also into the centre of the chancel. The seat in the second count, had been used by *R. Clutterbuck* and his descendants, and by the family of the plaintiff. On the same 18th *December*, the defendant *Townsend*, by the direction of the other defendant, cut down about three feet of the last-mentioned seat, standing upon the piece of ground second described in the feoffments, and the subject of the second count, and threw the boards into the inner part of the seats. The defendant *Anne Wicks* is the lay impropriatrix of the rectory of the parish of *Frampton-upon-Severn*. The tithes of that parish are paid partly to her, and partly to the vicar. The burial fees for the north part of the chancel are received by the defendant *Anne Wicks*: she received burial fees upon the burial of the children of Mr. *Henry Clifford*, the son of the plaintiff, who were buried in the north part of the chancel: the father of the defendant, *Anne Wicks*, who at the time of his death was impropriator of the parish, was buried on the south side of the chancel, a little within the chancel-door, and below the
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ascent. The moveable seat which then stood in that part of the chancel was moved to make way for that purpose. The roofs of both the north and south sides of the chancel have been kept in repair by the defendant and her ancestors, the lay impropiators of the parish.

The question for the opinion of the Court is, whether the plaintiff is entitled to recover on all, or either of the counts of the declaration. The verdict to be set aside, and a nonsuit to be entered; or to be set aside as to part, and to stand as to the rest; or to stand for the whole, as the Court shall direct.

Osborne, for the plaintiff. Where the rectory, since the stat. 27 H. 8. c. 28., and 31 H. 8. c. 13., has been impropriated, and is come into lay hands, it is converted into a lay fee, and is disposable as such; except that the rector, being seised of the body of the church for the benefit of the parishioners, (so far as respects pews to be placed thereon,) cannot there perhaps alienate the soil so as to interfere with that right: but in the chancel the freehold being in him absolutely, and it being parcel of his glebe, the soil is the fit subject of alienation. In *Stocks v. Booth* (a), *Buller J.* said, that trespass will not lie for an injury to a pew in the body of the church. The parties there, however, claimed no interest in the soil, but a mere easement, viz. a liberty to sit, which they take by distribution of the ordinary, under a faculty, or by prescription which supposes a faculty. This authority, however, does not go the length of deciding that the rector may not alienate the soil

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(a) 1 T. R. 418.

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even in the body of the church: his alienee indeed could not take a larger right than the grantor; and as the latter held the freehold of the body of the church for the benefit of the parishioners, at the distribution of the ordinary, as far as respects the pews, the alienee could only be possessed, subject to the same restriction. But it does not follow, that because the mode of using the property is restricted, that therefore it is not the subject of alienation. The right to bury, or permit others to bury, belongs to the parson, independently of the ordinary and churchwardens. *Frances v. Ley*. (a) To this right the alienee of the soil in the body of the church would be entitled; and if such alienee had obtained from the ordinary a faculty to sit in a seat placed thereon, he surely might maintain an action of trespass for a disturbance. There is however a material distinction between the body of the church and the chancel. *Corven's case* (b), *Hussey v. Leighton* (b), *Dawney v. Dee* (c), *Crook v. Sampson* (d), *Frances v. Ley* (c), and *Barrow v. Keen* (f), are authorities to shew that the aisles (which may be considered as small chancels) are distinguishable from the body of the church, and that there at least a man may prescribe for a seat; and all these cases proceed upon the ground that the ordinary has no jurisdiction there. In *Buston v. Bateman* (g) it is said, that unless a seat be in the body of the church, the ordinary has nothing to do with it; and that for the seats in the body of the church, it should be intended that the patron at the consecration of the church, resigned them to the ordi-

(a) 2 *Cra.* 367.(c) 2 *Roll. Rep.* 139. *Cra. Jac.* 604.(e) 2 *Cra.* 366.(b) 12 *Coke*, 105.(d) 2 *Kehle*, 92.(f) 1 *Sid.* 361.(g) 1 *Sid.* 88.

nary:

nary: and this case proceeded upon the distinction between the body of the church and the chancel, and therefore is a very strong authority to shew that the power of the ordinary extends only to the body of the church and not to the chancel. And although the parson is seised of the freehold of the church as well as of the chancel, still in the latter he has a freehold of a different and more beneficial description; in the body, the freehold is vested in him for the benefit of the parishioners, to be taken at the distribution of the ordinary, as to the pews there placed. The parson alone, therefore, cannot confer a complete title in the body of the church, but Lord *Coke* (a) says, "that for the body of the church the ordinary is to place and displace; in the chancel the freehold is in the parson, and is parcel of his glebe." In the chancel, therefore, the ordinary having no control, the parson alone may make a complete title to and grant the soil, and his grantee consequently cannot be interrupted by the churchwardens or the ordinary: and it is reasonable that he should have a larger interest in the chancel, than in the body of the church, for by the common law, the burden of repairing the latter rests upon the parishioners, but that of repairing the former, upon the parson; nor is any inconvenience likely to result from holding that the lay impropiator may alien his interest, for his alienee cannot claim to use it for all purposes indiscriminately, but only for spiritual purposes, viz. for seats and for burial, that is for the same purposes to which it would have been applicable while it continued in the hands of the lay impropiator;

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(a) *Brownlow and Goldsborough, Rep. 45.*

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and there is no reason to suppose the property is more likely to be abused in the hands of the lay alienee than of the lay grantor: and he cited an anonymous case (a) and *Walwyn v. Aubery* (b), to shew that the same remedies might be had against either; and that the profits of a rectory impropriate are not subject to sequestration: parts may be detached by grant from a lay rectory, as the tithes or a part of the tithes.

Campbell, contrà. The feoffment in this case does not convey to the grantee any interest that will enable him to maintain trespass. It is clear that trespass will not lie for breaking and entering a pew in the nave of the church, and there is no distinction between the nave and the chancel, except that in the latter, the parson or rector impropriate is entitled to the chief seat. And the dictum cited from *Rolle's* reports is explained by the report of the same case in *Croke* (c), from which it appears, that the pew there was in an aisle. Now it is laid down in *Gibson's Codex* (d), "that an aisle of a church, which has time out of mind belonged to a particular house, and been maintained and repaired by the owner of that house, is part of his frank tenement; and the ordinary cannot dispose of it, or intermeddle in it: and the reason is, because the law in that case presumes that the aisle was erected by his ancestors, or those whose estate he hath, and is thereupon particularly appropriated to their house." But this reason does not apply to the chancel, and therefore the dictum cited, is not in point; but the policy of the law is,

(a) *Anon. case*, 2 *Ventr.* 35.(b) *Walwyn v. Aubery*, 2 *Mod.* 257.(c) *Cro. Jac.* 604.

(d) 221

that

that the seats should be reserved for the use of the parishioners, and not of strangers. Now if the rector had the power of alienating, he might alienate the whole or a part to the inhabitants of a different parish; and parishioners might thence be excluded from the chancel, and perhaps ultimately, from the increase of population, wholly deprived of their right of sitting in the church. Such a right as is contended for, therefore, is obviously against the policy of the law; but in *Gibson's Codex* (a) it is said, "that seats in the chancel, are in the disposition of the ordinary, in like manner as those in the body of the church; which need only be mentioned because there can be no real ground for exempting it from the power of the ordinary, since the freehold of the church is as much in the parson as the freehold of the chancel: but this hinders not the authority of the ordinary in the church, and therefore not in the chancel." And in *Griffith v. Mathews* (b), *Buller J.* says, that a faculty might be presumed to build a pew in the *chancel*, from whence it clearly appears to have been the opinion of that learned Judge, that the ordinary had jurisdiction over the chancel: He was then stopped by the Court.

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Lord ELLENBOROUGH C. J. I am of opinion that the plaintiff in this case is not entitled to recover. This is a grant made to him and his heirs of a part of the chancel, not as a chancel, or for the purpose of being used as such, but generally and without any guard or restraint. If the rector might convey in this way to one person, he might do so to forty or fifty different

(a) 224.

(b) 5 T. R. 298.

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individuals, and by his so doing the parish might be put to great inconvenience: it might even enable him wholly to desecrate this part of the church, where particular parts of the service are required to be performed. Whilst it remains in the hands of the rector, it is under regulation and restraint; but in the hands of his grantee, that restraint ceases. Now can it be contended that any part of the patrimony of the church can be so separated from it, as to deprive succeeding rectors of their rights? Is it not the duty of the rector to retain such a power over the chancel as to enable him to see that it is applied to the purpose for which it was originally built? Without entering, therefore, into the question, whether the ordinary in this case has a paramount authority, so as to render his consent necessary, it seems sufficient to say that it is inconsistent, either with his duty or that of the rector, to alienate any part of the chancel in the manner done by this grant.

BAYLEY J. The general rule is, that the rector is entitled to the principal pew in the chancel; but that the ordinary may grant permission to other persons to have pews there. If this grant, however, were good, it would take the chancel entirely out of the jurisdiction of the ordinary. There is no instance of a right like this being in the rector or his alienee. This is a feoffment to the party and his heirs; and it is not necessary that they should be resident in the parish. Now if a part of the chancel may be granted away in this manner, there is no reason why the whole may not; and thus the chancel might be filled with seats which might descend to strangers, and so the parishioners might

might be wholly excluded. This would be a great inconvenience. The policy of the law plainly is, that the whole right shall be kept entire in the rector. I am therefore of opinion that the plaintiff cannot maintain this action.

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ABBOTT J. I am of opinion that this grant is void: it is made to the party and his heirs, and if good as to one part of the chancel, would be good as to the whole; and this inconvenience would then follow, that persons not inhabitants might, to the exclusion of the parishioners, have the sole right of seat and sepulture there. It is laid down, that the ordinary cannot grant a seat in the body of the church to a man and his heirs, without annexing it to some particular messuage: and the same argument *ab inconvenienti* applies to the case of a seat in the chancel. Without, therefore, entering into the question, whether the rector or the ordinary has in this case the paramount right, I am of opinion, that the rector cannot make a grant like this, inconsistent with the right of the parish; nor can he deprive succeeding rectors of the power of disposing of the rights of seat and sepulture to future inhabitants of the parish; for the right of the rector must in this respect be subject to the same restrictions as that of the ordinary.

HOLROYD J. It seems to me that no part of the chancel can be separated from the rectory. The rector has the freehold in the chancel in the same manner as he has in the church and the church-yard. Previously to the act for the dissolution of the monasteries, he could not have alienated any part of these without the

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consent of the ordinary. In that act (a) there is a clause introduced, saving "to all and every person and persons, bodies politick, &c., other than the abbots, &c., all such right, title, claim, and interest, &c. which they had before that act passed." This saving leaves the right as it existed before; and the chancel, therefore, is still inalienable by the rector. It would be productive of great inconvenience, and inconsistent with the nature of such property, if we were to hold that a grant of this sort could be valid in law.

Judgment for Defendant. (b)

(a) 31 Hen. 8. c. 13. s. 4.

(b) See *Pettman v. Bridger*, 1 *Phillimore's Rep.* 316.

BECKWITH, Clerk, *against* HARDING.

A custom for the churchwardens of a parish to set up monuments, &c. in a church, without either the consent of the rector or ordinary, is illegal.

TRESPASS, for breaking and entering a message of plaintiff, to wit, the parish church of the parish of *St. Alban, Wood-street*, in *London*, whereof plaintiff was and is rector, situate in the ward of *Cripplegate Within*, and in the said parish of *St. Alban, Wood-street*, and breaking down and damaging the walls thereof, and erecting a tablet therein. Plea, 1st, Not guilty. 2dly, Justification, as the servant and by the command of the churchwardens of the said parish, under an alleged immemorial custom within the said parish for the churchwardens thereof to erect tablets, &c. to the memory of deceased persons buried in the said church, at their pleasure, the leave of the ordinary for that purpose having been first obtained: with an averment, that the churchwardens aforesaid, before the time when, &c. procured the liberty and consent of the ordinary to erect the

the tablet in question in the said church; which averment was traversed in the replication to that plea, and issue was taken and joined thereon. The 3d plea, Like justification, under an immemorial custom stated as follows: — “ That within the said parish of *St. Alban, Wood-street*, in which, &c. there now is, and at the time when, &c. was, and from time whereof the memory of man is not to the contrary hath been, a certain ancient and laudable custom there used and approved of, that is to say, that the churchwardens for the said parish, for the time being, from time whereof the memory of man is not to the contrary, have had, and have been used accustomed to have, and of right ought to have had, and still of right ought to have, full and free right and authority to enter into and upon the said messuage in which, &c. in the said declaration mentioned, and there to erect, place, fix, and set up monuments, tablets, tomb-stones, and grave-stones, to the memory of deceased persons buried in the said last-mentioned messuage, in which, &c. every year, at all times of the year, at the free will and pleasure of such churchwardens.” The replication traversed this custom; on which traverse issue was taken and joined. This cause came on to be tried before the Right Hon. Lord *Ellenborough*, at the sittings held at *Guildhall, London*, when a verdict was found for the plaintiff, damages 1s., costs 40s. subject to the opinion of the Court on the following case: —

The above-mentioned parish church of *St. Alban, Wood-street*, and the parish of *St. Olave, Silver-street*, were united in one parish, and the church theretofore belonging to the said parish of *St. Alban, Wood-street*, became the parish church of the said united parishes by

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stat. 22 *Car. 2. c. 11. s. 63.* The plaintiff being rector of these united parishes, the defendant, without the consent and against the will and remonstrance of the plaintiff, erected the tablet in question against the north wall of the said parish church, under the directions of the churchwardens of those parishes, they being present, and insisting upon their right to put it up there. The tablet was put up in the body of the church (not in the chancel), to the memory of an inhabitant of the said parish of *St. Alban, Wood-street*, who died in that parish, and was buried in the body of the said church. It projected only about an inch and a half from the wall, was no obstruction or inconvenience, was neat, and rather ornamental, and contained not any thing in its inscription that was offensive or improper. It was so put up, however, *without any licence having been obtained from the ordinary.* The ancient custom of the parish of *St. Alban, Wood-street* aforesaid, always previous and up to the time of the aforesaid union, and the usage that has prevailed ever since in these united parishes upon the proof appears to be as follows. The parishioners have always been at the expence of the repairs of the chancel, as well as the body of the church. There is a vault under the altar, and under part of the chancel, wherein the rector has had and exercised the sole right of permitting persons to be buried, and has received to his own use all sums of money that have been paid for such permission and burial there, without any sum of money being received for the same by the churchwardens, and without their interference in any respect. The orders for burying, either in the rest of the chancel or in the body of the church, have always been given by the churchwardens, and the money paid for breaking

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ing the ground either on such burials, or on burials in the church-yard, has always been paid to the churchwardens, to the use of the parishioners. The applications for vaults, and for permission to put up monuments, tablets, tomb-stones, and grave-stones, either in the church, chancel, or church-yard, have uniformly been made to the churchwardens, and the sums of money paid for the same have constantly been received by or on behalf of the churchwardens, for the use of the parishioners; and in some instances as large a sum as 30*l.* has been required and received by them for granting such a permission in the church. There was no evidence of any application to or interference by the rector on any such occasion. For the last twenty years and more, the fees paid on these occasions have been with respect to the burials of parishioners in the church-yard — 2*s.* for breaking the ground; 4*s.* for the bell; 2*s.* 6*d.* the rector's fee for the funeral service; 1*s.* 6*d.* the clerk's fee, and 1*s.* 4*d.* the sexton's: and in the church, 30*s.* for the ground, 7*s.* for the bell, 10*s.* for the rector for the funeral service, 5*s.* for the clerk, and 3*s.* 4*d.* for the sexton. — For the funerals for non-parishioners, either in the church or church-yard, the fees taken were double. The fees were received by the clerk, and those paid for the ground and bell were received for and regularly accounted by him to the churchwardens. These have not (as to their amount) immemorially been fixed invariable fees; for, by an order in writing, made at a general vestry, held the 20th *April* 1693, for the parish of *St. Alban, Wood-street, London*, and signed by the curate, the two churchwardens, and four overseers of the poor, and twenty-nine other parishioners, the duties

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for burials were ordered, ordained, and set, and to be paid as hereinafter mentioned, viz.

For a parishioner, his wife, child, or servant—				
For the ground or pitt in the church, or any	£.	s.	d.	
part thereof, to the use of the parish	-	1	10	0
For a burial in the parish vault, to the use of				
the parish	-	-	-	- 1 10 0
For the bell, to the use of the parish	-	0	4	0
To the minister, for his attendance	-	-	0	5 0
To the clerk, for his attendance	-	-	0	2 0
To the sexton, for digging the grave and at-				
tendance	-	-	-	- 0 1 10

That lodgers, inmates, and strangers shall pay double duties.

For the burial of a parishioner, his wife, or any of his children or servants in the church-yard, viz.

For the ground	-	-	-	- 0 2 0
For the bell, for the use of the parish	-	0	4	0
To the minister, for his attendance	-	-	0	2 6
To the clerk, for his attendance	-	-	0	1 0
To the sexton, for digging the grave and at-				
tendance	-	-	-	- 0 1 2

For the burials of inmates or strangers in the church-yard, the sums ordered to be paid were higher, and the sum for the ground (which was 10s.) was expressly stated to be for the use of the parish. But by the answer in writing of the parson and church-wardens of the parish of *St. Alban, Wood-street*, to the particulars enjoined by a warrant from the Lord Bishop of *London*, and other the Lords and Judges of the High Court of Star Chamber, in the year of our Lord 1635, they stated that the fees and duties which they

they received for ecclesiastical rights, they found in an ancient table of fees, which (as their ancestors affirmed) had hung up in their church ever since they could remember; the true copy whereof, they in that answer stated, that they exhibited to the commissioners for the fees, five years since, whereof they also exhibited a true copy. And in that copy the fees then received, and the particulars respecting the same, are described as follows :

“ The pytts in the church—

“ Item for a pytt in the body of the church, s. d.
 “ For a parishioner - - - - 6 8
 “ And for a stranger - - - - 8 0

“ Item, For a pytt in every of the chapels,
 “ For a parishioner - - - - 10 0
 “ And for a stranger - - - - 13 8

“ The profits of which pytts, as well in the body of
 “ the church, shall be to the use of the church, except
 “ that the churchwardens shall give for every pytt
 “ making, to the sexton 8*d.*, and to the clerk, for his
 “ pains in overseeing the making thereof, 12*d.* For
 “ which 8*d.* the sexton shall not only be charged with
 “ the making of every such pytt, but shall also see
 “ every such pytt covered with earth, except it be a
 “ tomb or other mason’s work; then the church-
 “ wardens, at the church’s charges shall do the costs
 “ thereof. — Duties for burials: — The parson’s duty
 “ is in the church, 12*d.*; in the church-yard, 2*s.*:
 “ the clerk’s duty is 16*d.*: the sexton’s duty is 12*d.*”

In the account of the churchwardens of that parish, of all receipts and payments made by them to the use of that parish from the feast of *Easter* 1612, until the feast of *Easter* 1613, they are described as sums received by them for pitta, knells, and peals at burials. And in a like

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account from *Easter* 1636 to *Easter* 1637, they are described as received for burials, pitts, and knells. The parish (it was admitted) have paid 30s. a year for 100 years to the rector for the time being, for a small piece of ground in the church-yard adjoining to the rector's vault in the chancel, and have received the fees for burials there. No evidence was given as to any licences being given by the ordinary, or as to any objections or obstructions having been heretofore made to the putting up of any monuments, tablets, tomb-stones, or grave-stones, or to any inscriptions thereon, for want of such licence; but application was made by the churchwardens of the above united parishes, to the Bishop of *London*, for a faculty to remove the vestry-room on repairing the church; when leave was given, on producing a certificate of the consent of the rector on 4th *June* 1812, to erect it in the north east corner of the church. The application was first made without the rector's consent, when the court refused to grant it for want of his consent; upon which the churchwardens obtained his consent, and then the faculty was granted. Evidence hath been received on both sides as to the usages in these respects that have prevailed in the different parishes of the city of *London*, for the purpose of ascertaining if there was any uniform custom or usage throughout *London* or not, in order that the result of that proof might be stated for the consideration of the Court, in case it should turn out to be such as the Court shall think can legally be taken into their consideration in this case. The result is, that there is no such uniform custom or usage, except that in all the parishes of which evidence hath been given of the custom for the repair of the parish churches, the cus-

tom is that the parishioners repair the chancel as well as the body of the church; and except too, that the custom appears to be in like manner uniform, without any proof to the contrary, in this, that the fees for breaking the ground for burial in the body of the church and in the church-yard are paid to the churchwardens: but in the rest of the above respects the customs vary. In some of the parishes the custom agrees entirely with that of *St. Alban, Wood-street*, in all the the above respects. In others it varies only in this, that the parson's right is not confined to a particular vault, but extends throughout the chancel, and also extends to his permitting the putting up the monuments, tablets, &c. and their inscriptions, in the chancel, in exclusion of the churchwardens. In others, though the churchwardens have the ordering and the emoluments of the ground for burial in the church and in the church-yard, yet not so as to putting up the monuments, &c. or inscriptions, which right belongs to and is exercised by the parson. And in others, the ordering and emoluments of putting up the monuments, &c. and inscriptions in the church and church-yard, are enjoyed both by the parson and the churchwardens, each of those parties receiving fees according to their respective agreements with the parties.

Marryatt, for the plaintiff. The freehold of the church is generally in the rector, and there is nothing in this case to shew that the freehold is divested from him. The circumstance of the parishioners repairing the chancel will not have that operation; for though they always repair the church, yet the freehold of it still remains in the parson. The very form of induction

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tion shews the interest the parson takes in the church, for he is inducted into the real, actual and corporal possession of the church, with the rights, profits, and appurtenances thereto belonging. An induction is considered as equivalent to livery of seisin; then if the parson has had the freehold conveyed to him by livery of seisin, what pretence is there for saying that any other person can enter upon his freehold? This therefore puts an end to the defence on the general issue. As to the second plea, that is expressly negatived by the fact found in the case, that there was no consent given here by the ordinary. And as to the custom set out in the third plea, for the churchwardens to set up monuments of any description for any purpose whatever, that clearly cannot be supported; for by the common law of the land, the setting up of ornaments or monuments in the church must be done with the consent of the ordinary. *Palmer v. The Bishop of Exeter* (a), *Cart v. Marsh* (b), *Bulwer, clerk, v. Hayes*. (c) The custom set out in that plea, being against the common law, is therefore bad.

Bolland, contra. It must be admitted, that by the general rule of law, the freehold of the church is in the parson; but in this case the question is, whether by the particular custom set out, the Court will not consider either that he has only a qualified freehold, or that the freehold is not in him at all, but in the churchwardens. For the clergyman here exercises no acts of ownership with respect to the church; and the churchwardens, on the contrary, exercise many: and besides, the expence of repairing both the church and the chancel, contrary

(a) *Str.* 576.(b) *Ibid.* 1080.(c) 3 *East*, 217.

to the usual course, falls upon the parishioners. A rent is indeed paid to the parson for a small portion of the church-yard, but that circumstance shews plainly that the rest of it is in the parishioners. Then, if so, he cannot maintain the present action. As to the custom stated in the second plea, that is negatived by the case, and must be laid out of the question. But in the third plea, there is a custom alleged that the churchwardens may enter to erect, place, set, and fix up monuments, tablets, &c. When they are so fixed up, the ordinary may undoubtedly take them down if he disapproves of them; but, subject to that restriction, the right is by special custom in the churchwardens to place them there. And the question here is between the churchwardens and the parson only. If this, therefore, be a valid custom, the defendant is entitled to judgment.

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LORD ELLENBOROUGH C. J. There is nothing in this case to take the freehold out of the rector, who is the plaintiff. He has the full and entire possession of it by his induction; and the facts stated in the case are not sufficient to divest him of it. Then there is a custom claimed for the churchwardens to fix in the church any monument, tablet, or inscription, however improper, without any ecclesiastical control whatever. Now assuming that a custom for the churchwardens to set up monuments in the church without the leave of the parson might be good, it is at any rate too large a proposition to contend for, that without either the consent of the rector or that of their common ecclesiastical superior they may put up any thing, however unseemly. That would in effect be entirely to secularize the church.

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If the custom claimed was for the churchwardens to set up monuments with the leave of the ordinary, the case might perhaps have been different. I am therefore of opinion that the custom claimed in the third plea is too large, and cannot be supported.

BAYLEY J. The freehold of the church is clearly in the rector, and not in the churchwardens; and the custom claimed is against the general rule of law, which requires the consent of the ordinary, and is therefore bad.

ABBOTT and HOLROYD Js. concurred.

Judgment for Plaintiff.

Tuesday,
April 21st.

DOE, on Demise of JAMES WOOD, against JAMES WOOD.

A testator devised a particular estate by name to T. W., his heir at law, and then devised to H. W. all the residue of his lands, to be kept in the name and family of the W.'s as long as can be: Held, that H. W. took an estate of inheritance.

EJECTMENT brought to recover lands situate in the parish of *Ifield* in the county of *Sussex*. Plea, General issue. The cause came on to be tried at the Spring assizes at *Hersham*, 1817, when a verdict was found for the plaintiff, subject to the opinion of the Court, upon the following case; with liberty to either party to convert the same into a special verdict.

The Rev. John Wood, of *Rusper* in the county of *Sussex*, being seised in fee of the premises in question, by his will dated *July 20th 1790*, duly executed and attested so as to pass real estates, after giving directions as to his funeral, devised as follows. "I give and devise to *James Wood, Esq. of Hickstead Place*, in the parish of *Twineham*, my farm called *Ockley* in the parish

parish of *Keymer*, with the great tithes and manor thereunto belonging. I give and devise to *Henry Wood*, of *Henfield* parish, yeoman, all the rest of my farms, lands, tenements, and buildings, and the perpetual advowson of *Rusper* rectory, to be kept in the family and name of the Woods as long as can be."

I give and bequeath to my housekeeper *Mary Stone* for a legacy, the sum of 500*l.* at my decease, in case she lives with me, and is kind to me, and careful of me until my death, which 500*l.* lies in the hands of *Thomas Wonham*, of *Newdigate* parish, on a mortgage. I likewise give her six silver tea spoons, and a pair of silver tea tongs marked *J. W.*, and two large silver table spoons. And my will is, that my housekeeper *Mary Stone* should have the choice of a bed, two pair of sheets, three blankets, and all the furniture belonging to a bed, and all other household goods and furniture sufficient for a single person; and if I have any dog living with me at my decease, my will is, that my housekeeper *Mary Stone* shall keep the said dog as long as he will live, and my two executors to pay her the sum of 3*l.* every year for keeping the said dog; but if my housekeeper *Mary Stone* has any thing to do with *James Chapman*, of *Rusper* parish, my will and desire is, that he or she shall return all that he or she has received according to the direction of this my said will, into the hands of *Henry Wood* of *Henfield* parish, or his heirs; for I esteem *James Chapman* to be a man of a very bad principle."

And after bequeathing some pecuniary legacies, testator proceeds as follows, "I give and bequeath into the hands of my two executors hereafter named, in trust 200*l.* to purchase a piece of ground to make

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a waggon road and high road, for the use of the glebe land in *Rusper* parish, and to be bought as soon as it can conveniently, and to settle the said ground to the glebe land in *Rusper* parish, to make a road for waggons, carts, and all other traffick for ever. And until the said ground be purchased, the interest of the money, that is, of the 200*l.* is to be paid to the resident minister of *Rusper* parish." The testator then bequeathed other part of his personal estate, and appointed *John Burry* and *William Garret* his two executors. The testator then proceeds as follows. "And after these two executors have seen all these legacies are paid and made over to the proper owners, and settled according to the direction of this my said will, and the 200*l.* for to buy a road taken out of any of the personal estate; after all these things are settled, and all just debts, funeral expences, and all other dues whatever are paid by my executors out of any of the personal estate not mentioned, then and not before these things are settled, the remainder of the personal estate to be given into the hands of *Henry Wood*, of *Henfeld* parish, as his property, and desire he would keep the silver plate in memory of the family."

The said *James Wood*, of *Hickstead Place*, was first cousin to the said Rev. *John Wood*, being the eldest son of the Rev. *John Wood*'s father's elder brother; and the said *Henry Wood*, the devisee of the premises in question, was *James Wood*'s younger brother. Upon the death of the Rev. *John Wood*, the said *Henry Wood*, as devisee, entered and took possession of the premises in question, and levied a fine thereof, of *Michaelmas* term, the 32^d year of the king, and in the *Hilary* term following suffered a recovery thereof, with treble voucher,

voucher, wherein himself was first vouchee, and his son, the present defendant, the second vouchee, and died on the 7th day of *February*, 1816. *James Wood* the lessor of the plaintiff, is eldest son and heir at law of the said *James Wood* of *Hickstead Place*, and is also heir at law of the testator the Rev. *John Wood*. The defendant *John Wood* is eldest son, and heir at law of the said *Henry Wood*.

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The question for the opinion of the Court is, whether the lessor of the plaintiff is entitled to recover: if the Court shall be of that opinion, the verdict is to stand; if not, a verdict is to be entered for the defendant.

Doyley, for the plaintiff contended, that *Henry Wood* took only an estate for life, and that upon his death the estate vested in *James Wood* the heir at law of the testator. The general rule is, that there must be either express words, or some necessary implication arising out of the words used in the will, to disinherit the heir at law. In this case there are no express words. The question therefore is, are there words from which such necessary implication arises? The intention expressed by the testator is, that the estate should continue in his name and family. But that is not sufficient of itself to raise the necessary implication required by law, because by the heir at law taking the estate, that purpose will be effected equally as well as by *Henry Wood* having an estate of inheritance; and besides the words "name and family of the Woods" apply more emphatically to the elder branch. Then does the circumstance of the testator having left his heir at law another estate alter the case? In *Right v.*

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Sidebotham (a), the testator had given a legacy to his heir at law, and yet it was held, that would not prevent his taking; and *Denn v. Gaskin* (b) is to the same effect. And the case in *Douglas* is a very strong one, for certainly there it was clear to an ordinary apprehension that the testator meant to disinherit the heir at law. Where there is any uncertainty, it is better that the heir at law should take, for his title depends on the rules of descent, which are certain. If so, it becomes unnecessary to advert to the other circumstances in the will. It may be observed, however, that the testator leaves the residue of his personal property to *Henry Wood*. His intention might therefore be, that the whole of his real property, after the estate for life was at an end, should be united in the elder branch of his family, and the personal property in the younger branch. The lessor of the plaintiff is therefore entitled to the judgment.

Sugden, contra, was stopped by the Court.

LORD ELLENBOROUGH C. J. The sense of the will beams so clearly upon us, that it is unnecessary to hear the other side. After devising to the heir at law, his farm called *Ockley*, in the parish of *Keymer*, with the great tithes and manor thereunto belonging, the testator gives to *Henry Wood* "all the rest of his farms, lands, tenements, and buildings, and the perpetual advowson of *Rusper* rectory, to be kept in the family and name of the *Woods* as long as can be." Now to enable *Henry Wood* to keep the estate in the family and name of the

(a) *Dougl.* 759.(b) *Cowp.* 657.

Woods as long as can be, he must take more than an estate for life. It is not material for the Court now to consider by what means *H. Wood*, whether by limiting the estate after him in strict settlement, or in some other way, was to effectuate the intention of the testator, since at all events it was clearly the object of the latter to give such an estate as would enable his devisee to carry that intention by some means into effect. There is no question about the rule as to disinheriting of the heir at law; for here the estate is left expressly to another person, who, in order to fulfil the plain intention of the testator, must be adjudged to have taken an estate of inheritance.

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BAYLEY J. I am of the same opinion. In order to carry into effect the purpose of the testator, we must give to the devisee such an estate as may enable him to keep the property in the family and name of the *Woods* as long as can be. The former part of the devise "of all his farms, lands, tenements, and buildings," would not give more than an estate for life. Nor would the words "perpetual advowson" carry it any farther; for the word perpetual applies only to the description of the property, and not to the quantum of interest which the devisee takes in it. But the words "to be kept in the name and family of the *Woods* as long as can be," are words clearly shewing the intention of the testator to give his devisee more than an estate for life. In order to fulfil the testator's intention, *H. Wood* must either limit the estate in strict settlement, or must in some other way take care that it should continue in the family and name of the *Woods*. But if you give him only an estate for life, he has no means to do this. To give

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effect therefore to the testator's intention, *Henry Wood* must take an estate of inheritance.

ABBOTT J. The testator, by the words "to be kept in the name and family of the *Woods* as long as can be," must mean to be so kept by *Henry Wood*: he must therefore have intended that *Henry Wood* should have the power of limiting the estate in order to carry that purpose into effect: that cannot be, unless *Henry Wood* takes more than a life estate.

HOLROYD J. I am also of opinion that *Henry Wood* took an estate of inheritance by this devise. The lands, &c. were given to him by this will for his enjoyment, and for the further purpose of being kept in the name and family of the *Woods* as long as can be. Now as that was to be done by means of the devise, *Henry Wood* must have taken more than an estate for life,

Judgment for defendant.

Wednesday,
April 22d.

The KING *against* GORDON.

Where a parish contained within itself a borough not co-extensive with it, and the mayor of the borough, on a return to a mandamus for allowing a poor rate made by the church-

wardens and overseers of the whole parish, stated a custom which had existed since the 43 *Eliz.* 2. of appointing separate churchwardens and overseers, and of making separate rates for the borough and for those parts of the parish which lay without the borough; it was holden that such custom was invalid, and the return was quashed accordingly.

for

A MANDAMUS had issued, on the application of the churchwardens and overseers of the parish of *Wotton Basset*, in the county of *Wilts*, commanding *Alexander Gordon*, mayor of the borough of *Wotton Basset*, and also a justice of the peace within the borough, to allow, confirm, and sign a rate or assessment made by the churchwardens and overseers of the parish

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for the relief of the poor of the parish, (the borough lying within and being part and parcel of the parish,) and which rate had been allowed by two justices of the peace for the county, as to so much as respected that part of the parish which lies without the borough, and which had been tendered to the defendant, as such mayor and justice, to be by him, confirmed, allowed, and signed, as far as related to the borough, and which he had refused to do. To which mandamus the following return was made: That the borough of *Wotton Bassett* is an ancient borough, consisting of a mayor, two aldermen, and twelve capital burgesses, and that the mayor and two aldermen are justices of the peace within the same; that the borough lies within and is part and parcel of the parish of *Wotton Bassett*, and that the rest of the parish is not nor ever was within the borough or its liberties; that the whole parish of *Wotton Bassett* lies within the division or hundred of *Kingsbridge*; that the mayor and aldermen of the borough ever since the 43rd *Eliz.* have been accustomed to appoint the overseers of that part of the parish lying within its liberties to act for the borough, and that the justices of the county acting for the division of *Kingsbridge* have always appointed the overseers of the poor for that part of the parish lying without the borough, and that these latter overseers have always been accustomed to make separate rates and assessments for the relief of the poor of that part of the parish lying without the borough, and the overseers for the borough to make separate rates also for the relief of the poor of the part of the parish lying within the borough. The return then stated, that the defendant was mayor of, and one of the justices of the peace for the borough, but not for the county, and that the

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the rate in question was made by the churchwardens of the parish, and by the overseers of the poor appointed by the justices of the county for that part of the parish lying *without* the borough, and that the rate was made by them only, and for the relief of the whole of the poor of the parish to be levied on the whole of the inhabitants; and that certain persons therein mentioned were, before the making of the rate in question, overseers of the poor of the borough, and as such had tendered to the defendant, a rate duly made by them, as such overseers, for the relief of the poor of that part of the parish lying within the borough; that he had allowed and confirmed that rate, which was published and collected from that part of the parish lying within the borough, and applied towards the relief of the poor there. And that for these reasons he had not allowed and confirmed the rate in question.

Casberd, who objected to this return, was stopped by the Court, who called on

Richardson (a) to support it. He contended that the return was good, inasmuch as the churchwardens and overseers of the borough were justified in making a separate rate for that part of the parish lying within the borough. By the stat. 43 *Eliz. c. 2. s. 1.*, the overseers and churchwardens of the *parish* are to make the rates upon the parish; and the case where a town corporate is co-extensive with the parish is provided for by the 8th section. The present case is expressly within the 9th section, which enacts, “that if the parish

(a) At the close of *Richardson*'s argument, *Mercwether*, who was with him, rose to address the Court; but Lord *Ellenborough* said that it was the practice to hear one counsel only on a return to a mandamus.

lie partly within the liberties of any town corporate and partly without, that then, as well the justices of peace for every county, as also the head officers of such city, town, or place corporate shall deal and intermeddle only in so much of the said parish as lieth within their liberties, and not any further; and every of them respectively within their several limits, wards, and jurisdictions, to execute the ordinances before mentioned concerning the nomination of overseers, the consent to binding apprentices, the giving warrant to levy taxations unpaid, the taking account of churchwardens and overseers, and the committing to prison such as refuse to account, or deny to pay the arrearages due upon their accounts." The magistrates, therefore, are to act in virtue of the provisions of this section in their respective jurisdictions only. The magistrates of the county, therefore, could not appoint overseers for the borough; and it follows, that those overseers cannot make a rate upon the inhabitants of the borough. The rate then is not valid, and the Court will not, therefore, grant a mandamus to allow it. The return states, that this has been the usage ever since the statute of *Eliz.*; and it is important that the rights and privileges of the borough should be preserved. In *R. v. Hollister*, reported by the name of *R. v. Folly (a)*, the Court allowed a return exactly similar to the present.

LORD ELLENBOROUGH C. J. The 9th section of the 43d of *Elizabeth* specifies and enumerates many acts that may be done separately, where a parish is partly within a town corporate and partly without; but it

(a) 1 *Bott.* 78.

does

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does not mention the act of making rates. Now this of itself affords a very strong presumption that the legislature contemplated the making of one entire rate for the parish; and besides, that section, after directing in what way the churchwardens and overseers are to be appointed, enacts expressly that they shall without dividing themselves execute their office in all places within the said parish. That shews distinctly that one rate only for the whole parish must be made, and prohibits the making of separate rates by the separate bodies of churchwardens and overseers as has been, according to the custom stated in this return, done within this borough. Notwithstanding, therefore, the case cited, I think that this return to the mandamus is bad, and that it must be quashed.

Return quashed.

Wednesday,
April 22d.

HOWARD against SMITH.

An intervening Sunday is not to be reckoned as one of the four days during which a ca. sa. must lie in the sheriffs' office to charge the bail.

MARRYAT on a former day in this term obtained a rule nisi for setting aside the proceedings against the bail for irregularity, with costs, on the ground that the ca. sa. had not lain in the office four entire days exclusive of the day on which it was lodged, and the return day. The ca. sa. was lodged in the office on *Wednesday 21st January*, returnable on the following *Monday*. The question was, whether *Sunday*, being an intervening day, could be reckoned as one of the days.

Comyn now shewed cause. There is no decided case expressly upon this point; and it must therefore be

be determined by analogy to other cases. Bail have eight entire days to render their principal, yet this Court in *Crestwell v. Green* (a), decided that an intervening *Sunday* is to be reckoned as one of the eight: and he cited *Forty v. Hermer* (b), and *Anonymous* (c), and *Cock v. Brockhurst*. (d)

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LORD ELLENBOROUGH C. J. The object of the rule is, that the bail should have four days allowed them to search the office, that they may know whether it be necessary to render their principal or not. That being so, and *Sunday* not being a day on which any search can be made, the bail would, if *Sunday* were reckoned as one of the days, only have three entire days during which they could search the office. I am therefore of opinion, that the ca. sa. should have lain in the office four entire days exclusive of the *Sunday*; and consequently that the proceedings are irregular.

BAYLEY J. The ca. sa. must lie in the office four entire days exclusive of the day on which it is lodged and the return day. The four days are allowed to the bail that they may search the book to which they always have access; a day therefore on which they cannot have access to that book, will not answer the object of the rule, and therefore cannot reckon as one of the four days. In the other case something may be done on the *Sunday*; for though they cannot render the principal on that day, still they may take him: but here nothing can be done. I am therefore of opinion, that the proceedings are irregular.

(a) 14 East, 537.

(b) 4 T. R. 583.

(c) 2 Salk. 599.

(d) 13 East. 588.

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ABBOTT J. The object for which the four days are allowed is, that parties may have an opportunity of searching. The days therefore must be such on which search may be made; *Sunday* is not such a day, and therefore is not a day within the meaning of the rule.

HOLROYD J. concurred.

Rule absolute.

Friday,
April 24th.

DOE, on Demise of **PRATT** and Others, *against*
TIMINS and Another.

Devise to the heir at law in fee, with an executory devise over in case he does not attain 21 years of age; held that this does not alter the quality of the estate, which he would otherwise have taken as heir; and that he therefore takes by descent, and not by purchase.

EJECTMENT for the recovery of premises, formerly copyhold, holden of the manor of *Aldenham* in the county of *Hertford*, consisting of three cottages and outbuildings, and thirty-one acres of meadow or pasture land, situate in the parish of *Aldenham* in the said county, now in the occupation of the defendant *John Fane Timins, Esq.*; and also for the recovery of a freehold dwelling-house, situate in *Watford* in the said county, now in the occupation of the other defendant *Joseph Edmonds*. The declaration consisted of twelve counts, with different demises, which it is unnecessary to particularize. The defendants, *John Fane Timins, Esq.* and *Joseph Edmonds*, severally appeared, and pleaded not guilty; and also severally entered into the common consent rules to confess lease, entry, and ouster. The cause came on to be tried before the Right Honourable *Edward Lord Ellenborough*, at the last *Hertfordshire* assizes, when, a verdict was found for the plaintiff, with damages 1*l.*, costs 40*s.*, subject to the opinion of the Court on the following case:

11†

That

That at a court holden for the manor of *Aldenham*, on the 7th day *April* 1774, *Thomas Berrow* was admitted tenant to the copyhold part of the premises, to hold to him, his heirs and assigns for ever, subject to the payment of an annuity of 8*l.* a-year to *Jane Finch* for her life, of the lords and lady of the said manor, by the rod, at the will of the lords and lady, according to the custom of the said manor, by the rent of 6*s.* 8*d.* fealty, suit of court, &c.; and immediately after such admission the said *Thomas Berrow* surrendered the said premises to the use of his will. That said *Thomas Berrow* being thus seised of the copyhold part of the premises, and being also seised in fee of the freehold house in *Watford*, made and published his last will and testament in writing, bearing date the 29th day of *July* 1781, and duly attested, in which he disposes of the same as follows:

“ I give and bequeath to my son-in-law *William Jones*,
 “ 10*l.* Item, I likewise give to my said son-in-law
 “ *William Jones*, in trust, or his assigns, my freehold
 “ house, situate near the market-house at *Watford*,
 “ *Herts*, in the *High-street*, and now in the occupation
 “ of *Job Jones*; likewise my copyhold estate at *Ilys-Hill*,
 “ in the parish of *Ardnam*, *Herts*, and in the occupa-
 “ tion of *Daniel Child*, (a surrender thereof to the use
 “ of my will being already made, and a description
 “ being in my admittance to the said estate.) I like-
 “ wise give to my said son-in-law, in trust, the produce
 “ of my book-debts, stock in trade, with the produce of
 “ all my goods and chattels, plate, china, and wearing
 “ apparel, and every thing that can be called mine,
 “ whatsoever and wheresoever, with all my cash which
 “ is left after my debts and legacies are paid, with the
 “ expences of being admitted to the aforesaid copyhold
 “ estate;

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“ estate; I say, I leave to my son-in-law *William Jones*
 “ of *New Brentford, Middlesex*, mealman, in trust, all
 “ the above estates real and personal, for him, or his
 “ assigns, to pay out of the said estates to my aforesaid
 “ wife *Sarah* the sum of 8s. weekly and every week
 “ during her natural life, or the said sum, I mean the
 “ amount thereof, quarterly, as she pleases. And if
 “ the said sum is not paid within fourteen days after
 “ the quarter (if demanded), it shall be lawful for her,
 “ by her attorney, to seize on the above copyhold
 “ estate; and if the demand is not paid within fourteen
 “ days after distress taken, then it shall be lawful for
 “ her, &c. to sell the said copyhold estate, and out of
 “ the produce thereof to pay herself the charges of
 “ distraining and selling the said estate, to buy herself
 “ an annuity for her life, returning the overplus, if any,
 “ after sale thereof, and securing an old annuitant, one
 “ *Mrs. Finch*, 8l. a-year during her life, chargeable
 “ upon the said estate, to the said *William Jones* in
 “ trust. And if the said copyhold estate, as aforesaid,
 “ should not be sufficient upon sale to secure the pay-
 “ ment of both annuities, with charges of sale, &c.,
 “ then it shall be lawful for the remainder of the said
 “ annuities to be paid out of the freehold estate as
 “ above. Item, after all expences are paid, and the
 “ annuities properly settled, I would have the remain-
 “ der of my cash to be laid out in some of the public
 “ funds; and the dividends thereof, with the rents of my
 “ estates as above, I give to my aforesaid son-in-law
 “ *William Jones*, or his assigns, in trust for the sole use
 “ of my aforesaid grandson *William Berrow Jones*, till he
 “ my said grandson arrives at the age of twenty-one
 “ years; and when he does arrive at the age of twenty-

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“ one years, then my will is that my said grandson be
 “ put into possession of the above estates and money in
 “ the funds, and to be his only and at his own disposal,
 “ after my wife's annuity of 20*L.*, and *Mrs. Finch's* an-
 “ nuity of 8*L.*, each yearly, as above observed, are justly
 “ and honestly paid, without any deduction. But if my
 “ said grandson *William Berrow Jones* should not arrive
 “ to twenty-one years, then I give the said estates and
 “ interests of money as aforesaid, after annuities are as-
 “ sisted and paid, to my sister-in-law *Deborah Berrow*,
 “ widow of my late brother *Captain Berrow*, or her as-
 “ signs, in trust for the use of her three children, *Debo-*
 “ *rah, Fanny, and Harriott*, daughters of my said bro-
 “ ther *Captain Berrow*, in the same manner as I had
 “ before given to my grandson.”

That on the 18th *November* 1781, the said *Thomas*
Berrow died seised of the said copyhold and freehold
 premises without revoking or altering his said will,
 having had issue an only daughter, *Ann Berrow*, who
 married *William Jones*, the testator's son-in-law, men-
 tioned in his will, and died on the 9th *August* 1775, in
 the life-time of the testator, leaving an only child
William Berrow Jones, who was born on the 29th
January 1774, and attained the age of twenty-one
 years on the 29th *January* 1795, and died on the
 11th *October* following, intestate and without issue.
 That the said *William Berrow Jones* was the grandson
 and heir at law of the said *Thomas Berrow*, ex parte
 materna; and that the said *Deborah, Fanny, and*
Harriot Berrow, the testator's nieces, to whom the
 estates were given in the event of his grandson's not
 arriving at the age of twenty-one years, were on the
 death of the said *William Berrow Jones*, his cousins

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and co-heiresses at law, *ex parte materna*, that is to say, as daughters of *Edward Berrow*, (the brother of the said *Thomas Berrow*,) who died on the 16th *April* 1778. That the said *Deborah Berrow*, one of the lessors of the plaintiff, on the 20th *December* 1793, intermarried with *Thomas Campbell*, who died on the 15th *February* 1809, and afterwards married *John Pratt*, another of the lessors of the plaintiff, on the 11th *January* 1816. That the said *Fanny Berrow* married *Edward Jones* on the 15th *December* 1792, and died the 11th *November* 1813, leaving an only daughter *Deborah*, another lessor of the plaintiff, who intermarried with *William Warner*, another of the said lessors, on the 11th *June* 1815. That the said *Harriet Berrow*, another of the said lessors, on the 14th *May* 1798, intermarried with *Christopher Dennet*, who died the 17th *September* 1803, and afterwards married *Henry Man*, another of the said lessors, the 28th *January* 1808. That on the death of said *Thomas Berrow*, the said *William Jones* was, at a court holden for the said manor of *Aldenharn* on the 30th day of *September* 1782, admitted to the copyhold part of the premises; "to hold the same to him the said *William Jones* and his assigns, in trust for the several uses, intents, and purposes, and subject to the payment of the annuities and sums of money mentioned in the said will of *Thomas Berrow*, at the will of the lords and lady, according to the custom of the said manor." And that the said *William Jones* received the rents and profits of the copyhold premises, and also of the freehold house at *Watford*, until the time of his death, which happened on the 9th day of *May* 1799. That said *William Jones*, after the death of said *Anne Berrow*, intermarried with *Lydia Piper*, and had

had issue of that marriage two sons, *John Smith Jones*, who died without issue on the 4th *September* 1799; and *Augustin William Jones*, born the 1st day of *February* 1784, who is still living, and one of the lessors of the plaintiff. That *Jane Finch*, one of the annuitants mentioned in the will of the said *Thomas Berrow*, also died in or about the year 1799, and that *Sarah Berrow*, the other annuitant, who afterwards married *Anthony Chiselden*, died on the 15th *July* 1806. That on the death of said *William Berrow Jones*, *Richard Jones* was his heir at law, ex parte paterna, (that is to say) as brother of *William Jones*, the father of the said *William Berrow Jones*. And that after the death of the said *William Jones*, the said *Richard Jones* was, at a court holden for the said manor of *Aldenham* on the 23d day of *April* 1800, admitted to the said copyhold premises; to hold to him, his heirs and assigns for ever, subject nevertheless to the several uses, intents, and purposes mentioned in the said will of said *Thomas Berrow*, if any such did then exist, at the will of the lord; according to the custom of the said manor. That the said *Richard Jones*, on the death of the said *William Jones*, took possession of the freehold house at *Watford*; and by indentures of lease and release, bearing date the 2d and 3d day of *September* 1800, and made between the said *Richard Jones* and *Mary* his wife of the first part, *Anthony Chiselden* and *Sarah* his wife, formerly *Sarah Berrow* widow, of the second part, and the said *Joseph Edmonds* and *William Cartwright*, a trustee for and on behalf of said *Joseph Edmonds*, of the third part, conveyed the said freehold house, with the appurtenances to the defendant *Joseph Edmonds*, his heirs and assigns. And

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that in *Trinity* term, 1806, a fine sur conuizance de droit come ceo, &c. was levied thereof by the said *Richard Jones* and his wife to the said *Joseph Edmonds* and *William Cartwright*, the acknowledgment of which was taken from the day of the *Holy Trinity* in three weeks, being the 29th day of *June*, in the fortieth year of the reign of his present Majesty. And that the proclamations thereupon were made as follows, to wit: The first proclamation was made on the 27th day of *June*, in *Trinity* term in the said fortieth year of the king. The second proclamation was, made the 29th day of *November*, in *Michaelmas* term in the forty-first year of the said king. The third proclamation was made the 5th day of *February*, in *Hilary* term in the said forty-first year of the king. The fourth proclamation was made the 15th day of *May*, in *Easter* term in the said forty-first year of the king. That the said *Richard Jones* shortly afterwards sold and surrendered the copyhold part of the premises to the Hon. *George Villiers*: and at a court holden for the said manor of *Aldenham*, on the 10th day of *November* 1806, the said *G. Villiers* was admitted to the said copyhold premises, subject to the payment of 2s. a week, to *Sarah Chiselden*, late *Sarah Berrow*, the widow of the said *Thomas Berrow*, for her life; to hold the same unto the said *G. Villiers*, his heirs and assigns for ever, at the will of the lord, according to the custom of the said manor. That by indentures of lease and release, bearing date the 12th and 13th days of *June* 1804, and made between *George Woodford Thelluson*, Esq. of the first part, *Martin Bonneras*, *Rogers Parker*, Esq., and *Peter Isaac Thelluson*, Esq., of the second part, and the said *George Villiers* of the

first

third

third part, the said copyhold premises were enfranchised by the said *George Woodford Thelluson*. That a writ of extent having afterwards issued on behalf of his Majesty against the said *George Villiers*, the said last mentioned premises were extended under the same as part of the property of the said *George Villiers*; and by two several indentures of bargain and sale, bearing date respectively the 26th *December* 1810, and 5th *December* 1814, and duly enrolled in his Majesty's Court of Exchequer, part of the said last mentioned premises were bargained and sold, and conveyed by *Abel Moysey, Esq.* the Deputy Remembrancer of his Majesty's Court of Exchequer, to the defendant *John Fane Timmins, Esq.* That on the 30th day of *May* 1817, an entry was made by *Charles Holland* on the said freehold house at *Watford*, to avoid the fine thereof, by virtue of a letter of attorney duly executed by the lessors of the plaintiff for that purpose.

The question for the opinion of the Court is, whether *William Berrow Jones*, grandson of *Thomas Berrow*, took the estate by descent or purchase. If the Court shall be of opinion that said *William Berrow Jones* took the estate by descent, the verdict to stand for the whole or such part of the premises as the Court shall think proper; if not, a nonsuit to be entered.

Held, for the lessors of the plaintiff. The grandson took by descent and not by purchase. The rule is, that wherever the heir at law of the devisor would take the same estate in quality under the will as he would take by descent without it, he shall take by descent. This is an ancient established principle, originally adopted in our law, first, for the benefit of the lord, to preserve

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the tenure and entitle him to the fruits of it; secondly, for that of creditors and others having demands on the ancestor's estate, and in some instances for the advantage of the heir himself, as it would toll a right of entry or entitle him to the benefit of a warranty. It applies to copyhold as well as freehold lands, *Smith v. Triggs* (a), *Hurst v. Morgan* (b), *Watkins on Descents*, 175. First, the fee was not devised by the will at all, but descended to the grandson as heir at law, subject to the payment of certain annuities specified in the will, with an executory devise over to the nieces in the event of the grandson dying under twenty-one: or, secondly, supposing the trustees to take an estate under the will for the life of one or both annuitants, the grandson would then take by the will, a vested remainder in fee, with an executory devise over to the nieces; and this remainder being the same estate in quality as he would take if there had been no devise to him, he would in that case take by means of the rule an estate by his preferable title of descent. If the first supposition is correct, it excludes any difficulty which may otherwise arise in the case, and gets rid of the authority of *Scott v. Scott* (c), which will be relied upon by the other side. The will is confusedly and obscurely drawn, and there is an apparent repugnance between some of the clauses; but the great object of the testator as collected from his entire will was not only to secure payment of the annuities, but to provide for the due collection and management of the surplus rents and profits of his real, as well as the produce of his personal estate, until his grandson should attain the age of twenty-one, when he might pay the

(a) 1 Str. 487.

(b) *Watkins on Copyh.* 123.(c) *AmbL.* 383. 1 *Eden. Rep.*

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annuities and manage for himself, or in the event of his dying before twenty-one, to make the same provision for his nieces: with this view he first gives an estate to his grandson's father and his assigns as trustees; no words of inheritance are used, and any estate which he takes is to be raised by implication from the purposes for which the trust was created, as they appear on the face of the will. It was unnecessary that he should have an estate commensurate to the continuance of the annuities, as in order to secure them, a right of distress, and also of selling the copyhold lands, had been given to the widow in default of payment. The object of the trust is therefore answered by the trustees taking an interest in the lands until the grandson attains twenty-one, or his dying previously: conformable to this construction the testator declares the object and duration of the devise in trust to be "till my grandson arrives at the age of twenty-one, and when he does arrive at the age of twenty-one, then my will is that my said grandson be put into possession of the above estates, to be his only, and at his own disposal, after my wife's annuity, &c. are paid, without any deduction." It appears, therefore, that the grandson was to be put into possession of the estates, and the surplus, after paying the annuities, was to be his own. A similar trust is created by a devise over to the mother of his nieces in the event of his grandson dying before twenty-one; from whence the testator's intention is plain, that the interest of the trustee should cease altogether when the grandson should attain twenty-one. Secondly, assuming that the trustee took an estate for the life of one or both annuitants, still the legal reversion in fee descended upon the grandson, subject to an executory devise over

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in the event of his dying before he attained twenty-one. It is clear that he took no greater estate, because the law will not raise by implication a larger estate in trustees than the purposes of the trust absolutely require. It cannot be contended, therefore, that the trustee took more than an estate *pur autre vie*; as such an estate would enable him fully to answer the objects of the trust: then whether the grandson took an estate vesting immediately in possession upon the testator's death, or only upon that of the annuitant, he still took a fee as heir. The circumstance of the devise being fettered with the payment of annuities does not alter the quality of the estate; for it is established law, that where lands are subjected to a charge by will with a devise to the heir in fee, the descent is not broken, *Allam v. Heber* (a); not even where the possession was devised for a term of years, *Heidger v. Rowe* (b); nor where it is subject to legacies, *Clarke v. Smith* (c), *Haynsworth v. Pretty* (d); nor to a rent-charge or annuity, *Emerson v. Inchbird* (e), and *Chaplin v. Laroux*, *Trin.* 56 G. 3. And it makes no difference that the estate devised to the heir at law is intended as a remainder after an estate for life, *Preston v. Holmes* (f); or that there was a devise to trustees for the purpose of raising legacies by sale or mortgage.

Then does the circumstance of the estate being given to the heir with the executory devise over, alter its quality so as to break the descent, being no more than the substitution of another fee-simple upon the occurrence of a parti-

(a) 2 Str. 1270. 1 Black. 22.

(b) 3 Lev. 127.

(c) Lutw. 793. 1 Salk. 241.

(d) Cro. Eliz. 833. Moore, 644.

(e) 1 Ld. Raym. 728.

(f) Styles, 148. 1 Roll. Abr. Dis. pl. 2. f. 626.

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cular event, for that which the heir would have taken by descent: the fee is devised to the heir, subject to be defeated on a contingency, and until that happens he continues to have the fee; and if it never happens he always has the fee. In *Hinde v. Lyon* (a), the devise was to the wife till the son and heir should attain the age of twenty-four years, and that then the wife should have a third of the manor for her life, and the son the residue; but if the son died before twenty-four years without heirs of his body, then remainder over: and it was held that the fee-simple descended to and remained with the son, unless he died before twenty-four years. And this case is cited by *Hobart J.* as good law in *Cowden v. Clarke*. (b) In *Haynsworth v. Pretty* (c) the devise was to the eldest son in fee, upon condition of his paying his legacies to the second son and daughter; and in default of his so doing, then to such second son and daughter: it was holden, after argument upon special verdict, that the devise to the heir in fee, being no other than what the law gave him, was void, and that it was a future devise to the second son and daughter, upon the contingency of the eldest son making default in payment. And in *Chaplin v. Leroux*, *Trin.* 56 G. 3., the devise was to the wife for life, provided she did not marry; and if she married, to the son in fee; and after her death, at all events, to the son in fee, charged however with an annuity to the daughter for life; and after the death of the wife and daughter, the testator bequeathed 1500*l.* to the daughter's children; and if no children, then subject to her appoint-

(a) *Dyer*, 124. 2 *Leon.* 11. 3 *Leon.* 70.(b) *Hobart*, 30.(c) *Cro. Eliz.* 833. *Moore*, 644. *Faulkner*, 271.

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ment; and in case of no appointment, to her executors; and in default of his paying the annuity to the daughter, or the legacy to her children, then he devises to a trustee, &c. In this case the Court of K. B. held that the executory devise over did not alter the quality of the estate, and that the son took by descent, and not by purchase; and *Bayley J.* is reported to have said, that a fee being mounted upon a fee does not necessarily turn the first fee into a base fee: these are strong authorities to shew that the circumstance of a fee being fettered with an executory devise over upon a particular contingent event, does not so alter the quality of an estate in fee as to prevent the heir taking by descent. Against this current of authorities, *Gilpin's case (a)*, and *Scott v. Scott (b)*, will be cited. *Gilpin's case*, however, in Mr. Ford's manuscript report of *Allam v. Heber*, was said by the Court not to be law, and was so considered by *Bayley J.* in *Chaplin v. Leroux*; and if *Scott v. Scott* is to be considered as establishing the proposition, that an executory devise over upon a particular event does break the descent, it is at variance with all the other cases upon the subject; and that case certainly has not met with the general approbation of the profession, for Mr. Serjeant *Hill*, in a note to his *Ambler*, states that the judgment is right, but the reasons given for it are wrong; and then cites authorities to shew that an executory devise over upon a contingency does not break the descent. (c) Upon the weight of
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(a) *Cro. Car.* 161.(b) *Amb.* 383. *Eden.* 458.(c) The following is the note referred to by *Nolan*, and is a transcript from the book now in the possession of Mr. *Scriven*.SCOTT v. SCOTT. — *Amb.*

The determination in this case is right, but the reason given for it is wrong; that the reason is wrong appears from *Cro. Eliz.* above referred

authorities, therefore, as well as upon the reason of the thing, an executory devise over upon a particular contingent event does not alter the quality of an estate in fee. Although it may by possibility affect its continuance, yet while in esse it is a fee simple; the heir therefore took by descent, and not by purchase.

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D. Pollock, contra. The grandson took under the devise an estate of a different quality from that which he would have taken by descent: by the latter he would take a fee absolutely; by the former he takes it with a qualification, and with a qualification too, in-

referred to, and many other cases; but though a devise of the fee simple to the testator's heir is void in all cases, notwithstanding the land is devised subject to a charge, as appears by the cases referred to by *Ambler* in the margin, by *Str.* 1270., *Lord Raym.* 728., 2 *Burr.* 879. 882. 1 *Vent.* 372. S. P. admitted *Hob.* 30., and many other authorities, (all contrary to *Gilpin's* case, *Cro. Car.* 161., which has sometimes been cited, and expressly overruled, as in *Comyns*, 72.;) and so a devise to the testator's heirs in fee, subject to a contingency, as in *Cro. El.* ut supra, and in the case here before Lord *Northampton*, is void; for it amounts to the same as if there had been no devise to him, but only a devise from him upon a contingency; and, therefore, if the contingency on which the devise from him is to take effect never happens, the heir takes by descent and not by purchase. Though a devise to the testator's heirs, if not restrained to a less estate than a fee-simple, is void as to passing the estate, yet the devise to the heir will in many instances influence the construction of the will, as was holden by Lord *Holt*, 1 *P. Wms.* 24, 25., and accordingly adjudged in the case there; and so was the opinion of Lord *Harcourt* with respect to the point on which the decision here reported by *Ambler*, must have been founded; for, according to the case in *Salk.*, though if lands descend to an heir (which from the context must be understood where they are not mentioned in the will to be devised to him,) if the personal estate be exhausted in payment of bonds, the legatees may stand in their place, and be paid out of the real estate, as is clear they may; and he seemed to admit the same; yet Lord *Cowper* in that case held, that since the testator had devised the lands, that "they ought to be exempted, for it was as much the testator's intention that the devisee should have this land, as that the others should have the legacies, and a specific legacy is never broke into in order to make good a pecuniary one."

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terially affecting his rights, for if he had married and died before twenty-one, his wife would not be entitled to dower, because the estate would go over upon the contingency happening; whereas, if he had taken by descent, the wife would have been entitled to dower; and suppose the executory devise over to have been in case he had died before twenty-four years of age, then as devisee under the will, from twenty-one to twenty-four he would have been deprived of the power of alienation and devise; as heir, he would not: yet according to the authority of the cases relied upon by the plaintiff, the quality of an estate in such a case as this would not be altered; in the one case he would have the entire disposition over the property; in the other he would have little more than the rights of a tenant for life. *Scott v. Scott* is an authority of great weight, for it was decided by Lord Keeper *Henley*, after argument and after taking time to consider his judgment; and *Hinde v. Lyon* and most of the other authorities now cited, were there relied upon, and were finally overruled: the judgment now given by Mr. *Eden*, is taken from the manuscript notes of Mr. Justice *Aston* (a), and fully confirms the report in *Ambler*. In *Chaplin v. Leroux*, *Scott v. Scott*, was taken by plaintiff's counsel to be settled law. The right of disposal of the estate is given to the heir only after the annuities shall have been justly and honestly paid; if therefore, as happened in this case, the annuitants survived the period of the heir's attaining twenty-one, he had not the full right of disposal of the estate from that time until their death. And in this case a power of entry and

(a) *Ambler* stated that these notes were taken while *Aston J.* was at the bar, and were not intended for publication.

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and sale, quite inconsistent with the heirs having a fee, is given to the annuitants, for they are to be at liberty to recover the land whenever the annuity has been in arrear fourteen days; no such remedy existed at common law against the heir; that is another circumstance materially affecting the quality of the estate. For in *Haysworth v. Pretty*, the Court said, that in case a man had devised, that if his eldest son should not pay his legacies, then that the land should be to the legatees, there was no doubt, but that in default of payment, the land should vest in them; which is similar to the devise here. Here there is a condition, that if annuities are not paid within fourteen days, the annuitants may bring ejectment against the heir, which quite alters the situation of the heir. On both these grounds therefore, the quality of the estate is altered, and the heir in that case must take by purchase and not by descent.

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BAYLEY J. (a) The first question in this case is, what estate the trustee, *W. Jones*, took under this will, because if he took a fee, there would be nothing to descend to the heir at law; it is not, however, contended in argument that he did take such an estate, and the true construction seems to be that he took the estate till the grandson attained the age of twenty-one years, and the estate was then to vest in the grandson subject to the annuities, with a devise over in case the grandson did not arrive at the age of twenty-one. The testator begins by giving "to his son-in-law *W. Jones*, in trust, or his assigns, his freehold house at *Watford*, and his copyhold estate at *Ilys-Hill* in the parish of *Ardnam*,"

(~~Lord Eldon~~ Lord C. J. was absent.

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he does not limit the quantum of interest which *W. Jones* is to take. The copyhold estate was at that time subject to an annuity of 8*l.* per annum to *Jane Finch*, and the will goes on to state, that he leaves to his said son-in-law "in trust all the above estates real and personal, to pay out of the said estates to my aforesaid wife *Sarah* the sum of 8*s.* weekly and every week during her natural life; or the said sum or the amount thereof quarterly as she pleases." Here too he does not state what interest the trustee is to take; but he would by implication take an estate during the life of the widow unless it be controlled by other limitations in the will. The will then proceeds to give the widow a power, in case the above sum is not regularly paid, to seize on the copyhold estate and to sell it, and out of the produce thereof, after paying the charges of distraining and selling the estate, to buy herself an annuity, and to secure *Mrs. Finch's* annuity of 8*l.*; and if the copyhold estate should not be sufficient to secure their annuities, then to charge the remainder of the said annuities on the freehold estate: and after all expences paid, and the annuities properly settled, he bequeaths the remainder of his cash, with the rents of his said estates, to *W. Jones* or his assigns, "in trust for the sole use of my aforesaid grandson *W. Berrow Jones*, until he attain the age of twenty-one years; and when he does arrive at the age of twenty-one years, then my will is that my said grandson be put into possession of the said estates and money in the funds, and to be his only and at his own disposal." The testator, therefore, gives the estate in trust for the use of his grandson till twenty-one, and directs that when he arrives at that age he shall be put into possession of the estates. There is no express de-

vise of the estates to the grandson, but there is a direction that he shall be put in possession of them, which is not to be postponed till after the death of the annuitants: it is as if the testator had said, I mean my grandson to be put into possession of the estate at twenty-one, to be his only and at his own disposal; nevertheless the estate is not to be so much his own as to enable him to defeat the annuities, but he is to hold it subject to them: then the power of distress and sale will attach on the land in his possession. The question then is, does this power of distress and sale, and the executory devise over, break the descent or not? It seems to me that they do not. Where the estate is given to the heir at law, expressly subject to an annuity or charges, it does not break the descent, and *Haynsworth v. Pretty (a)* is a strong authority to shew that an executory devise over has not this effect; there is no difference whether there be an express devise to the heir at law or not. Suppose the whole will here had consisted of the ultimate limitation to *Deborah Berrow*, that would have been an executory devise to take effect on the grandson not attaining twenty-one; in the interim the estate would have descended on the heir at law. I can see no reason, therefore, why the heir at law here, should not take by descent, and there are strong reasons why he should. The case of *Scott v. Scott* has received a sufficient answer in argument at the bar. In *Chaplin v. Leroux* this Court thought the heir took by descent: the quantity and quality of estate being the same, whether he took by descent or devise; the quantity because in both cases the heir took a fee, and the quality because he took in severalty. And that is also the case here. I

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(a) *Cro. Eliz.* 833.

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am therefore of opinion, that the descent was not broken, and that the lessors of the plaintiff are entitled to recover the whole of the copyhold estates, and one third of the freehold. As to the remaining two-thirds, they are barred by the fine.

ANNOTT J. I am of opinion, that in this case the heir takes by descent, and not by purchase. Suppose the will were read thus: the testator gives, first, an annuity to his wife, charged upon his freehold and copyhold estates; then estates to his son-in-law *W. Jones*, or his assigns, in trust for the heir at law, until he arrives at the age of twenty-one years; and if he dies under twenty-one, then to *Deborah Berrow* in trust for his nieces. There is also a power to the widow to sell the copyhold and freehold estates for the purpose, if necessary, of securing her annuity. Reading the will in this way, there is no express gift to the heir at law, who would therefore in such a case have taken by descent a fee simple. I have, however, omitted some words in the will, which in my opinion give the heir a fee simple: if so, he takes under the will the same estate as he would have taken by descent if the devise to him had been omitted, and in that case the law says that he shall take by this preferable title, viz. by descent.

HOLROYD J. I am of the same opinion. Taking the whole will together, I think the estate is given to the trustee only till the heir attain twenty-one. If it had stood upon the first part of the will alone, I should have thought that he took an estate in fee, or pur autre vie, in order to enable him to pay the annuities. This, however, is not requisite, supposing the heir substituted
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for this purpose in the place of the trustee, when he attains twenty-one. Now this does appear to be the case; for it is quite inconsistent with the estate continuing in the trustee that the grandson should be in possession: for he, not the trustee, is then to receive the rents and profits. The estate is, therefore, given at that period to him, subject to the payment by him of the annuities. It has been held in several cases, that a devise to a party when he attains twenty-one is an immediate devise to him. And the will here gives the estate to him to be at his own disposal, which is a gift of a fee. The heir, therefore, takes under the devise an immediate estate in fee, which is the same estate as he would take by descent, and in that case his title by descent is to be preferred. Then has the devise over, in case he shall not attain twenty-one, made any alteration? I think not. The estate is still a fee simple in him, subject only to a contingent limitation, and is not a fee simple conditional in him. In *Comyn's Dig.*, tit. *Discent*, A., it is laid down that if a man devise to A. till his heir attains the age of twenty-four, and then to the heir in fee, and that his wife shall have a third part for her life; and if he dies before twenty-four, then to his wife for life, the heir takes by descent, and not by the devise. In *Buckworth v. Thirkell*, 3 Bos. & Pull. 652. n. the devise was to trustees for the use of *Mary Barnes* till twenty-one or marriage, and after twenty-one or marriage, then to the use of her and her heirs; but if she died before twenty-one, and without issue, remainder over. The facts were, that she married and had a child, the child died, and then she died under twenty-one. But it was held notwithstanding, that she took, in the mean time, a fee simple, and that her husband was entitled to be tenant

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by the curtesy. I think, therefore, on the whole, that here the heir took by descent, and that the defeasibility of the estate, upon the event happening which was contemplated by the will, made no difference.

Judgment for the lessors of plaintiff,
for one-third of the freehold, and
the whole of the copyhold estates.

DOE, on the Demise of BEACH and Others,
against The Earl of JERSEY.

Devise of all my Briton Ferry estate, and all the land, &c. of which it consists; and then all my P. L. estate, which, as well as my B. F. estate, lies in the county of G.: held that the former devise was not confined to lands in the county of G., but extended to all that was usually known by the name of the B. F. estate; although part of devisor's estate was situated in the parish of B. F. in the county of G.

EJECTMENT, to recover lands in the county of Brecon. The demise upon which the plaintiff sought to recover, was that of *Christopher Rice Mansel Talbot*. The cause was tried at the *Herefordshire* Spring assizes, 1817, when the jury found a special verdict, which stated the will of *Bussy Lord Mansel*, and deeds of lease and release, executed upon the marriage of his daughter *Louisa Barbara*, with *George Venables Vernon*, with certain schedules thereto annexed, purporting to contain a particular account of the several parishes and tenements comprehended in the estate of the late *Bussy Lord Mansel*. Under the head of the *Brecon* estates, was a parish called *Llyswell*, which contained the messuage and tenement in question; and under the head of *Glamorganshire* estates was a parish called *Briton Ferry*. The special verdict then set forth the will of *Louisa Barbara Vernon* as follows, after reciting the power reserved to her by her marriage settlement. "First, I give, devise, limit, and appoint, subject to the estate for life of my said husband therein, all that my *Briton Ferry* estate, with all the manors, advowsons, messuages,

messuages, buildings, lands, tenements, and hereditaments thereto belonging, or of which the same consists, with the appurtenances, unto *Thomas Earl of Clarendon* for his life, (my uncle,) and after his decease to the second son of *George Bussy Villiers, Earl of Jersey*, and his heirs, taking upon them the surname of *Mansel*, and endeavouring to obtain that peerage." The testatrix then charged the estate with the payment of certain legacies and annuities; after which, in a subsequent part of the will, she added, "Also I give and devise my *Penlline Castle* estate, which as well as my *Briton Ferry* estate, is situate, lying and being in the county of Glamorgan in the principality of Wales, with all the manors, &c. thereto belonging, or now therewith enjoyed, unto *Mrs. Emily Gwinnet*, spinster, of *Cothell* in *Glamorganshire*, at her disposal after her decease, and likewise to her heirs for ever, for her friendly attention to me in all my troubles, with this request, that she would add to the castle and reside there mostly in summer. Also I give and devise my *Susser* estates called *Newick Park*, with all the manors, advowsons, messuages, lands, farms, tenements, and hereditaments both freehold and copyhold thereto belonging, or now held and enjoyed therewith, unto my dear friend *Lady Fortescue* for life, requesting her to keep it, and reside there for a time. Then I bequeath it to her youngest son *Matthew Fortescue*, his heirs and assigns for ever." The testatrix then bequeathed her personal estate to the Earl of *Clarendon*, after the payment of several legacies. The special verdict then stated a codicil of the 20th August 1803, in which the testatrix stated, "the reason of my taking but little notice of my relations is, that they never

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thought fit to assist me in my troubles, or ever made a point of getting my child." It then stated the death of *Louisa Barbara Vernon* on the 1st March 1786, without issue, and the death of *George Venables Vernon*, her husband, on the 1st June 1813, and that at the time of his death the said *Christopher Rice Mansel Talbot*, the lessor of the plaintiff, was, and still is cousin and next heir to the said *Louisa Barbara Vernon*, and to the said *Bussy Lord Mansel*, the father of the said *Louisa Barbara Vernon*. And that the tenements in the said county of Brecon, together with the said manors and tenements in the said county of Glamorgan, had been known by the name of the Briton Ferry estate, and by no other name for fifty years before the death of the said *Louisa Barbara Vernon*; and that the said lands and tenements in the said county of Brecon are not contiguous to, or adjoining to the said manors and tenements in the said county of Glamorgan, or any or either of them, but lying dispersed in the said county of Brecon; but that some part of the said lands in the said county of Brecon is within one mile of some part of the said lands in the said county of Glamorgan; and that the said lands and tenements in the county of Glamorgan do also lie dispersedly in the said county of Glamorgan; and that the aforesaid manors and tenements in the county of Glamorgan contain 30,000 acres, or thereabouts, part whereof consists of the capital messuage, lands, and tenements in the parish of Briton Ferry, comprising the whole of the said parish; and the aforesaid lands and tenements in the county of Brecon, contain 4000 acres, or thereabouts; and that there are six advowsons, whereof the advowson of the parish of Briton Ferry is one, and one manor, and one undivided sixth

part of another manor (the whole into six equal parts to be considered as divided) in the county of *Glamorgan*, and that there is no manor of Briton Ferry: and that there is no advowson or manor in the county of *Brecon*, whereof the said *Bussy Lord Mansel*, and the said *George Venable Vernon* the younger respectively died seised: and that at the time of making the will of the said *Louisa Barbara Vernon*, and also at the time of her death, the annual value of the said lands in the parish of *Briton Ferry* alone, was 32*l.* 8*s.* 10*d.* The special verdict then concluded by stating a formal entry and ouster.

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W. E. Tatnall, for the lessors of the plaintiff, after stating that the question in this case depended upon the extent of the devise in *Louisa Barbara Vernon's* will, contended, that the first devise of "all my *Briton Ferry* estate, with all the manors," &c., was qualified and explained by the subsequent clause, giving her *Penlline Castle* estate, and the recital that that and the *Briton Ferry* estate were situate in the county of *Glamorgan*; all, therefore, that she meant to pass by that term, were lands situate in the county of *Glamorgan*. If indeed this latter clause had not been in the will, nothing could pass but the lands situate at the place called *Briton Ferry*; for there being a place of that name, parol evidence is not admissible to shew that land at any other place would pass; and all that part of the special verdict which states facts in explanation of the deed should be considered as struck out. [Lord *Ellenborough*. The parol evidence has been admitted: we must take the facts as they appear upon the record; we have no power to say that we will sift what has been found by

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the jury, and leave out what ought not to have been received. The description in the will is not a description by place, but by name, and comprehends all that passed under the aggregate name; and the special verdict tells us what that was.] In *Doe v. Oxenden* (a) the argument was, that all that had been known by the name of the *Ashton* estate ought to pass under the words "my estate of *Ashton*;" but the Court of Common Pleas held, that parol evidence was not admissible to shew that any thing more was meant to pass than land locally situate at *Ashton*; and their judgment was afterwards affirmed in the House of Lords. [*Holroyd J.* The words there used were a local description, and were so considered by *Gibbs C. J.* in pronouncing the opinion of the Judges in the House of Lords.] Assuming then that the description here is not local but by name, still it appears, from the two clauses taken together, that lands in *Glamorganshire* only should pass. The first devise by itself is uncertain; it may mean any thing, either the name of a man or place; it stands by itself, without any matter of local description by which it can be ascertained; and if it be in any the smallest degree uncertain, it must receive construction and explanation from the other clauses of the will: then the subsequent clause describes the *Briton Ferry* estate as being in the county of *Glamorgan*; and amounts to a declaration on the part of the testatrix, that all that was meant to pass by that name was situate in that county. By putting this construction upon the will, the words of the first devise will be satisfied, for the devise will include a property locally situate at *Bri-*

(a) 3 Taunt. 147. 4 Dow. 65.

ton Ferry; and it will not be inconsistent with the terms of the second devise, by which she has explained the term *Briton Ferry* estate to mean lands situate in the county of *Glamorgan*; and *Tuttesham v. Roberts* (a) is an authority to shew that in such a case those lands alone will pass. [Abbott J. In the case of *The Vicars Choral of Litchfield v. Ayres and Others*, Sir W. Jones, 435. (b), there was a grant of all the tithes belonging or appertaining to the grantor or impropriator of a parish, and then followed, "all which were lately in the possession of one *Margaret Peto*, widow, deceased." There it was holden that all the tithes belonging to the rectory passed, although none had been in the possession of *Margaret Peto*; and it is stated in 2 *Roll. Abr.* 54. pl. 26. to have been so decided on the ground that the latter words were words of suggestion or affirmation and not of restriction or limitation; and *Roe, on Demise of Conolly, v. Vernon* (c), was decided on the same ground. Now here the case is equally strong, for all the *Briton Ferry* estate is devised; and that is a perfect description; and the words in the latter devise, which relates to a different estate, are mere words of affirmation and not of restriction.] The description of itself is not perfect; and if it be in any the smallest degree imperfect, it must receive explanation from the subsequent clause in the will; and that clause should be considered as incorporated with the first, and then there would be nothing but a devise of "all my *Briton Ferry* estate in the county of *Glamorgan*." But if there be any repugnance between the different parts of a will, the

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(a) *Cro. Jac.* 22.(b) Reported also in *Cro. Car.* 546.(c) 5 *East*, 51.

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latter clause is to take effect. *Co. Litt.* 112 b., and *Sheppard's Touchstone*, 88.; and in 2 *Roll. Abr.* tit. *Grant*, P. pl. 8., it is laid down, that if a man grant his manor of *D.* in the county of *M.*, and the manor extend to that county and another, nothing but what is in *M.* will pass; and in pl. 10., if the king is seised of the rectory of *Kingswood* in the county of *Wilts*, and also of the tithes of *Haselden Grange*, as of a portion of tithes in county of *Gloucester* appertaining to the said rectory, and he grant his rectory of *Kingswood* in the county of *Wilts*, and all the tithes appertaining to that rectory, that portion of the tithes of the *Grange* will not pass by these general words; for the words shall have the same limitation by construction of law that the first words had, to wit, all the tithes appertaining to the rectory in *Wilts*. In that case there were no words of local description applicable to the tithes; and yet the words "all tithes appertaining to the rectory" were restrained by the local description of the rectory, and construed to mean only the tithes in the county of *Wilts* belonging to the rectory. And in *Doe v. Greathed* (a), the devise was to two persons, and the testator, after reciting that he had conveyed his manor of *Hampreston* in the county of *Dorset*, by a marriage-settlement, and that the manor and other hereditaments were then lately purchased by him from Lord *Arundel*, gave and devised the said manor and lordship, &c. of and in *Hampreston* aforesaid, and all and singular other the manors or lordships, messuages, and so forth, in or near *Uddens* aforesaid, or elsewhere in the county of *Dorset*, to certain persons: and then this Court held, that part

(a) 8 *East*, 91.

of the manor, which was situate in *Hampshire*, did not pass by the will. And *Doe v. Lyford (a)*, and *Doe v. Greening (b)* are authorities to the same effect.

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LORD ELLENBOROUGH C. J. I think this case is sufficiently clear; and if the Court should be mistaken in the determination to which they are about to come, it will be open to the party to set that right by a writ of error. It appears from the will, that the testatrix first devised "all that her *Briton Ferry* estate, with all the manors, advowsons, messuages, buildings, lands, tenements, and hereditaments thereto belonging, or of which the same consists." So that here there is an aggregate description of all those premises known by the name of the *Briton Ferry* estate, and there is a description of that estate by name, which is quite free from any the least uncertainty. Then there follows a devise of her *Penlline Castle* estate, which the testatrix says, "as well as my said *Briton Ferry* estate, is situate, lying, and being in the county of *Glamorgan*:" that, it is argued, must be considered as tantamount to an introduction of the word *Glamorgan* into the original devise of the *Briton Ferry* estate; and so there would be a local description by the testatrix of that property, which would confine the devise to that part of it which lies within the county of *Glamorgan*. To this I answer, on the authority of the case in *Sir W. Jones*, that words of suggestion or affirmation (which these are, and not of restriction or limitation,) cannot do away that which before was a clear and perfect devise. The case of *Goodtitle, on Demise of Radford, v. Southern (c)* is to

(a) 4 M. & S. 550. (b) 3 M. & S. 171. (c) 1 M. & S. 299.

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the same effect; so that even if the Court were to take the subsequent words into their consideration, still they are only words of suggestion or affirmation, and it is not necessary to construe them with the same strictness as if they had been words of restriction or limitation. Here there is a clear devise by name of the *Briton Ferry* estate, and no case has been cited to shew that it is not sufficient to describe an estate by its aggregate name; and therefore I have no doubt that the whole of the *Briton Ferry* estate passed by this description in the will.

BAYLEY J. I have always taken the rule to be, that where a testatrix has sufficiently described the property intended to be devised, so as to leave no fair ground for doubt as to the property, that then the addition of another circumstance with a view to identify it, will not limit and restrain the first devise, unless it clearly appears that the testatrix so intended it. That rule will be found in *Doutie's* case (a), and in *Doe v. Greathed*. (b) Now if that rule be applied to the circumstances of this case, it will stand thus: the testatrix has an estate partly situate in the county of *Glamorgan*, and partly in *Brecon*, which for many years before her will had been known by the name of the *Briton Ferry* estate, part of it being situate in the parish of *Briton Ferry*; in which parish the testatrix had no manor, and only one advowson. Then she devises "all that my *Briton Ferry* estate, with all the manors, advowsons, messuages, &c. thereto belonging or of which the same consists." It is therefore clear, that this devise cannot be confined to that part of the *Briton Ferry* estate situate within the parish of *Briton Ferry*,

(a) 3 *Coke*, 10. a.(b) 8 *Ess*, 103.

for the testatrix speaks of "manors and advowsons," and in that part of the estate there was no manor, and but *one* advowson: the devise, therefore, must extend to the whole of the *Briton Ferry* estate. Then there is in the will a subsequent devise of the *Penlline Castle* estate, in which there is an addition to the description of the *Briton Ferry* estate, which is applicable only to part of it, and which is quoad the residue a false description; and the question then arises, whether this will limit or narrow the prior devise. Now there does not appear on the face of the will any such intention on the part of the testatrix, and if so, then provided the words of the former devise admit of no reasonable doubt, the addition of these latter words will not vitiate it. Now, do the words of the former devise admit of any fair doubt. The words "all that my estate" must mean an entirety, and there is no entire estate called the *Briton Ferry* estate which is confined to the county of *Glamorgan*. The words, therefore, of the first devise being clear, are not to be confined by the subsequent description in the will to that part of the estate which is within the county of *Glamorgan*; and the defendant, therefore, is entitled to the judgment of the Court.

ABBOTT and HOLROYD Js. concurred.

Judgment for the Defendant.

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The KING against The Inhabitants of TODDINGTON.

There cannot be a guardian in socage of an equitable estate; and, therefore, where a pauper married the widow of a man who had paid for and been let into possession of a freehold cottage, and had died leaving a daughter, but without having had any legal conveyance executed to him in his lifetime; it was holden that the pauper's residence in the cottage for forty days did not confer a settlement on him, the widow not being guardian in socage to the daughter.

Held also, that the Court will not take notice of doubtful equitable estates.

UPON an appeal against an order of two justices, by which *David Evans*, *Susanna* his wife, and their five children, were removed from the parish of *Flitwick* in the county of *Bedford*, to the parish of *Toddington* in the same county, the sessions confirmed the order, subject to the opinion of this Court on the following case:

The pauper, *David Evans*, in the year 1800, gained a settlement by hiring and service for a year in the appelland parish of *Toddington*. In 1801, *Samuel Elmer*, the then husband of the pauper *Susanna*, agreed to purchase of one *James Evans* a cottage in *Flitwick*; no conveyance was made by *James Evans* to *Elmer*, and no evidence was given of any written contract between them, nor was there any proof of the particulars or terms of their agreement. It was admitted that *James Evans* received of *Elmer* 16*l.*, and that *Elmer*, by consent of *James Evans*, entered upon the cottage, and continued in possession till *November* 1802, when he died intestate, leaving the pauper *Susanna* his widow and a daughter *Phæbe*, their only child and his heir, then about three years of age. The widow with the child continued to reside on the premises, and in *July* 1804 married the pauper, *David Evans*, then legally settled in the parish of *Toddington*. Upon the marriage he came to live with his wife and her child by *Elmer* on the estate, and continued with them more than forty days. By indenture of feoffment, dated 12th *September*

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1808, (on which seisin was delivered,) *James Evans* granted the cottage in question unto and to the use of the pauper *David Evans*, his heirs and assigns; the consideration stated in this feoffment is 16*l.*, expressed to have been at or before the sealing and delivery thereof paid by *David Evans* the grantee to *James Evans* the grantor, but neither that nor any other sum was then paid; the only consideration being the money which *James Evans* had in 1801 received of *Samuel Elmer*. By indenture of feoffment, dated 14th October 1808, the paupers, *David Evans* and his wife, in consideration of 25*l.*, conveyed the premises to one *William Farrer*. It was contended, upon the part of the appellant parish of *Toddington*, that upon the death of *Samuel Elmer* the cottage descended to his infant daughter, and that the pauper *Susanna* thereupon became her guardian in socage; and that the pauper *David Evans*, by his marriage with the widow, and his subsequent residence for forty days with her and her ward upon the premises, acquired a settlement in *Flitwick*. The questions intended to be submitted to the Court are, whether *James Elmer*, the first husband of the pauper *Susanna*, had such an interest in the estate as gave to his widow the character of guardian in socage of their infant daughter; and whether the pauper *David Evans*, by his marriage with the widow, and his subsequent residence on the premises with her and the child for more than forty days, gained a settlement in *Flitwick*.

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Nolan and *Whitred*, in support of the order of sessions. It may be admitted, that if the widow was in this case guardian in socage, the pauper gained a settlement by his residence in the parish of *Flitwick* for

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for forty days. But the widow was not guardian in socage, for in order to constitute a guardianship in socage, the heir must have the lands by descent, as appears from *Littleton* (a), and *Quadring v. Downs and Another*. (b) The reason why a guardian in socage gains a settlement by residing on the estate, is because he has an interest in the premises, *Rex v. Oakley* (c), *Rex v. Wilby*. (d) But here the heir herself had no interest in the land of which the Court can take notice. It may be questioned whether she had any equitable estate at all, for the payment of the money will not give her one, as appears from *Clinan v. Cooke*. (e) But supposing this only doubtful, it has been often decided, that this Court will not take notice in such cases as these, of doubtful claims in equity, *Rex v. Standon* (f), *Rex v. Horndon on the Hill*. (g)

Blossett Serjt. and Hawkins, contra: The rule laid down in the Court of Chancery is, that where there has been a part performance either by the payment of the money, or by a giving of possession, the party is entitled to an equitable estate in the premises. Here there have been both of these requisites which distinguishes this from *Clinan v. Cooke*. There was therefore in this case a clear equitable estate, and the party afterwards obtained the legal estate. It may be safely admitted, that this Court will not take cognizance of questionable cases in equity: but this is not one of that description. And that the Court will take notice of clear equitable estates, appears also from

(a) Sect. 123.

(b) 2 Mod. 176.

(c) 10 East, 494.

(d) 2 M. & S. 504.

(e) 1 Sch. & Lef. 40.

(f) 2 M. & S. 461.

(g) 4 M. & S. 562.

Lord

Lord *Kenyon's* judgment in *Rex v. Offchurch*. (a) Then the question arises, whether, this equitable estate having descended on the heir, the mother can be considered as guardian in socage. The case of *Rex v. Oakley* is in point to this. For there it was an equitable estate, for the legal interest would not commence till after the term of five hundred years, created by the mortgage, should have expired. Suppose the daughter here had had a freehold by disseisin, (a descent having in this case been cast,) then there would have been a guardianship in socage; and the party here ought surely to be in a more favourable situation. Besides, the Court may presume a conveyance to *Samuel Elmer*, as was done in *Rex v. Butterson* (b), or if not to him, as being negatived by the case, at least one may be presumed to the daughter.

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LORD ELLENBOROUGH C. J. This is not an estate so clearly equitable, that a court of law can presume that a court of equity would, if applied to, clothe the party with the legal right to it. The case of the *King v. Oakley* is clearly distinguishable from this; that was decided on the assumed ground of a legal estate. But this is at most a question of an equitable estate only, and we are to consider, not only whether a court of equity would order a legal estate to be conveyed, but whether in that case the conveyance would operate ab antecedenti, so as to constitute a legal estate in the father which would descend upon the heir; for unless that be so, the guardianship in socage, which is one of the incidents of the legal estate descending with it, will

(a) 3 T. R. 114.

(b) 6 T. R. 555.

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not go to the widow. I think, therefore, that the widow in this case was not, nor ever has been guardian in socage. If so, her husband could not by residence in the parish gain a settlement, and the order of sessions must be confirmed.

BAYLEY J. I am of the same opinion. A court of law generally looks at legal rights only, and not at doubtful equitable estates. There are indeed equitable rights recognised by acts of parliament, of which perhaps courts of law are bound to take notice; but how can we in this case see that the party is entitled to an equitable estate? We do not know what was the original bargain between *Elmer* and *Evans*; and the case states a subsequent conveyance to a stranger, and not to the heir at law, from whence a totally different conclusion from that contended for, would seem to arise. Then the next question is, Is there a guardianship in socage, even supposing there is an equitable estate? Guardianship in socage only applies to cases of legal estates, and no case can be cited where it has existed in an equitable estate. Therefore, on that ground alone, it will be sufficient to say, the sessions have drawn the right conclusion.

HOLROYD J. (a) I am likewise of opinion, that there is no sufficient estate in this case. Where there is a conveyance to uses not executed, or on trusts stated on the face of the deed, the one party has the equitable, and the other the legal estate; and in these cases for collateral purposes, a court of common law will take

(a) *Abbott J.* was sitting in the Court of Chancery.

notice of such an equitable estate. An equitable estate however, is very different from an equitable right to have a conveyance of the legal estate. Here the party had only the latter; and if there be any doubt as to what a court of equity would do, this court cannot take cognizance of the estate. But supposing there is a sufficient equitable estate, there must also be a guardianship in socage, in order to confer a settlement in this case. It is to be observed that the law only took notice of the tenant of the legal estate. It was his duty to do all the services, if of age, and if he was an infant or lunatic, then the burden and right was cast upon the guardian in socage. The guardian in socage, therefore, was only appointed in the case of a legal estate: for, otherwise there would have been this incongruity, viz. that two persons would be bound to perform the services: first, the trustee, who, having the legal estate, was bound at common law to do them, and also the guardian in socage for the cestui que trust. It is said that the widow, by an application to a court of equity, might be clothed with the legal estate; but the utmost that that court could do, would be to decree a conveyance of the legal estate to the infant, who would then take by purchase and not by descent, and there can be no guardian in socage except where the heir takes by descent.

Order of Sessions confirmed.

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Saturday,
April 25th.

HOWARTH *against* SAMUEL.

When, upon setting aside a verdict for plaintiff, the costs are directed to abide the event, and then the plaintiff discontinues the action; the defendant is not entitled to the costs of the trial.

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THE plaintiff obtained a verdict at the Summer assizes for *York*. A new trial was granted on an application to the Court, and the costs were directed to abide the event. The defendant then gave notice of trial by proviso; upon which the plaintiff obtained a rule to discontinue the action, upon payment of such costs as should be taxed by the Master upon that rule. The proceedings in the action were then stayed by a Judge's order, on plaintiff's consenting that if the costs to be taxed on the rule were not paid within seven days, defendant should sign judgment of nonsuit. On taxing the costs, the Master allowed the defendant the costs of the trial; but afterward intimated to the parties that he thought his taxation wrong in that respect, and directed them to attend again, that his error might be corrected. Defendant's attorney refused to attend, and a rule was therefore obtained for the Master to review his taxation; against which

Topping and *Hullock* Serjt. now shewed cause. The rule is express upon the subject of the costs, that they are to abide the event. Now the suit has terminated in favour of the defendant by the plaintiff's discontinuing, which is an acknowledgment by him that he originally had no cause of action; and whether the event was produced by the plaintiff's own act, or the verdict of a jury, is immaterial. An executor who is not generally liable to costs, is so upon a discontinuance, if he knew that he had no cause of action.

BAYLEY

BAYLEY J. The rule, as laid down in *Austen v. Gibbs (a)*, where the costs are directed to abide the event, is this, that in case the same party succeeds again on a second trial, he shall have the costs of both trials: but if the verdict be different on the second trial from what it was on the first, the party succeeding on the second trial shall only have the costs of the second trial. This case must be decided upon the same principle. Discontinuance is a mode of terminating a suit by the act of the plaintiff himself: and it must be attended with the same consequences as to costs as if the event of the suit had been determined by the verdict of a jury. Now if the defendant upon a second trial had obtained a verdict, he would not have been entitled to the costs of the first trial, and therefore he cannot be entitled to them in the event which has happened.

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Rule absolute.

(c) 8 T.R. 619.

SOWERBY *against* WOODROFF.
Monday,
April 27th.

TINDAL had obtained a rule nisi for entering up judgment on an old warrant of attorney under special circumstances; and on shewing cause against this rule,

In entering up judgment on an old warrant of attorney, the affidavit may be properly entitled in a cause.

Marryatt objected, that the affidavit on which the rule was obtained, was entitled in the cause, and contended that it ought to have been entitled "In the matter of, &c." as in the case of applying to set aside a warrant of attorney given to secure an annuity. But

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The Court on referring to the Master (a), held it properly entitled; for the warrant of attorney must be taken as an admission of a suit pending in the Court, on which judgment is to be entered up.

(a) The Master read the following note: — *Poole v. Robberds*. On motion to set aside an annuity, the warrant of attorney does not sanction the affidavit to be entitled in a cause, unless judgment has been entered up. But contra ruled in *Manley v. The Marquis of Blandford*, Michaelmas term 1816. — For, *per Curiam*, the warrant of attorney constitutes a cause in court when used.

Monday,
 April 27th.

Ex parte PAGE, a Bankrupt.

Where a warrant of commitment by commissioners of bankrupts, after setting out the issuing of the commission, the adjudication of bankruptcy, &c., stated as the ground of commitment, that the bankrupt being brought before them, and they having proposed to administer an oath to him, he refused to be sworn, or to

give an account of his property: Held that such warrant was legal, and that it is not necessary in it to set out any specific question in such case; for this is a refusal to answer all possible questions which can be suggested. Held also, that after the issuing of the writ of habeas corpus, and before the return to it, the commissioners may, if necessary, make a fresh warrant, stating more fully the cause for detaining the bankrupt in custody, and that such warrant may by words of reference incorporate the formal parts of the first warrant. Held also, that if both warrants are defective in form, the Court will, if a substantial cause of commitment appear, re-commit the bankrupt *ex officio*. Held also, that a commitment by a justice of the peace, under 5 G. 2. c. 30. s. 14. of the bankrupt, "until he shall be discharged by due course of law," is bad.

GEORGE PAGE, against whom a commission of bankruptcy dated March 31st had issued, was taken into custody, and committed to Newgate on the 14th April, by the warrant of a justice of the peace under 5 G. 2. c. 30. s. 14. The warrant was as follows: To the keeper of his Majesty's gaol of Newgate, or his deputy. *Middlesex* (to wit); receive into your custody, the body of *George Page*, herewith sent you, brought before me *R. B. Esq.*, one of his Majesty's justices, &c. by *Daniel Bishop*, and charged before me the said justice, upon the oath of *George Adams*, with being the same identical person against whom a commission of bankruptcy hath been awarded and issued,

as appears to me by a certificate under the hands and seals of *E. C.*, &c., the major part of the commissioners in the said commission named, dated *April* 13th, him therefore safely keep in your said custody, until he shall be discharged by due course of law; and for so doing, &c. On the 18th *April*, he was brought up before the commissioners again and recommitted. The commissioners in their warrant, after setting out the issuing of the commission, and adjudication of *Page* as a bankrupt, and the notices, (which were all regular,) proceeded to state as the ground of the commitment, as follows: "And whereas the said *George Page* was brought before us this day to be examined, touching and concerning his estate and effects. And we having proposed to administer an oath to the said *George Page*, he refused to be sworn or give an account of his property. These are therefore to require, &c." proceeding in the usual form, and committing him until he should submit and full answer make to the satisfaction of the commissioners, to all the questions so put to him as aforesaid.

Marryatt, on the 22d *April*, obtained a writ of habeas corpus to bring up the bankrupt for the purpose of being discharged, on the ground that both these warrants were illegal. After the issuing of the writ, and before the bankrupt was brought up, the commissioners made another warrant of detainer, which was as follows: 24th *April* 1810, Whereas we, whose names are hereunto subscribed, being the major part of the commissioners, named and authorized in and by a commission of bankruptcy awarded and issued forth against *George Page* of *Cranbourne-street* in the county of *Middlesex*, silk-mercator, dealer, and chapman, dated at *Westminster* the 31st day of *March* last past, having

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met the day and the year and at the place above mentioned, for the purpose of examining the said *George Page*, relative to the disclosure of his estate; and the said *George Page* being brought before us by *William Erasmus Hardy*, clerk of the papers or deputy keeper of his Majesty's prison of *Newgate*, to which prison the said *George Page* had been committed, by a warrant under the hands and seals of *E. C.*, &c. being the major part of the commissioners named in the said commission, for refusing to be sworn or to give any account of his property. And the following questions being now put to the said *George Page*, to which he gave the answer following; that is to say, Question, Will you now submit to be sworn and examined by us, touching the disclosure of your estate, and particularly will you tell us where is the sum of 1600*l.*, which it has been stated upon oath before us you had lately received from the sale of your stock in trade. Answer, I can only give you the same reasons at present I before gave you, that until the action at law is decided, I cannot. And the said *George Page* refused to be sworn or examined by us touching the disclosure of his estate; we do therefore, &c.

Marryatt and *Andrews*, for the bankrupt. There are three warrants under which this bankrupt is committed, all of which are defective. The first, that of the magistrate is bad, because the commitment is stated to be till he is discharged by due course of law, which is clearly wrong, for it ought to have been "till he shall be removed by order of the said commissioners, or the major part of them, by warrant under their hands and seals," according to the express words and directions of 5 G. 2. c. 30. s. 14., by which this power
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of committal is given. As to the second warrant, that is also defective, because no question is stated on the face of the commitment, as is required by the seventeenth section. The third warrant is wholly out of the case, for it is issued after the writ of habeas corpus; and the question for the consideration of the Court is, whether the party was lawfully detained at the time of applying for the writ. If he was not, he is entitled to be discharged. But this commitment, if referred to, will be found defective also. For all commitments must set forth the issuing of the commission, &c. that it may appear that the commissioners had authority to proceed. But there is no such statement in this warrant. It may be said that it refers to the former warrant, in which these proceedings do appear, but one good commitment cannot be made up of two, which are each defective, and the Court cannot pick out a part from one, and a part from another; each must in itself contain a complete ground of detention: and the Court cannot now make a good commitment, even though they may see just ground for detention, for the eighteenth section, which gives them that power, does so only in cases where the objections are formal; but here they are substantial, and go to the whole cause of the detention. The bankrupt is therefore entitled to be discharged. — *Coombe's case. (a)*

Scarlett and Chitty, contra. It is not necessary to argue that the warrant of the magistrate in this case is legal, because if either of the warrants by the commissioners be valid, it will be sufficient. The first warrant may be considered as a warrant under the authority of 1 Jac. 1. c. 15., or under that act coupled with 5 G. 2. c. 30. The first of these two acts, sect. 7., gives to the

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(a) 2 Rose. Rep. Bankruptcy, 396.

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commissioners power to examine the bankrupt upon oath, and sect. 8. states, that if he shall refuse to be examined, or to answer fully to every interrogatory, the commissioners may commit him. The case of *Rex v. Nathan (a)*, which was determined in *Mich. 4 G. 2.*, decided that those interrogatories must be in writing. In the following year the statute 5 G. 2. was passed, which gave the commissioners the power of examining by word of mouth. Taking, therefore, the two statutes together, the bankrupt may be committed for refusing to be examined, though no questions have been put to him in writing. The second warrant is therefore good. There the refusal stated is general, and in unqualified terms: he refused to be sworn or give an account of his property. The third warrant is however free from this objection, for there the question and answer are set out. It is said, that this warrant cannot be relied upon, having been issued subsequently to the writ of habeas corpus. But this may be done, and was done in the case of *Rex v. James Gordon, Mich. term 1777. (b)* It

(a) 2 Str. 880.

(b) *Scarlett* read to the Court the following note, furnished to him by Mr. *Deatry*.

Michaelmas Term, 1777.

James Gordon, being committed to New Prison, *Clerkenwell*, till the next General Sessions, for assaulting a custom-house officer's assistant in execution of his duty.

Motion for a habeas corpus, because the statute 13 & 14 Car. 2. c. 11. directs that such offender shall be committed, without bail, till the next Quarter Sessions.

Writ of habeas corpus granted by the Court.

Afterwards, the defendant being brought up, the keeper of New Prison returned the warrant of commitment, which appeared to be to the General Sessions; but he also returned a warrant of detainer for the same offence, issued the day before he was brought up, by the same justice, which was till the next Quarter Sessions."

The defendant therefore was remanded without opposition, the warrant of detainer being strictly regular.

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is also contended that this warrant is itself defective in not setting out the issuing of the commission, &c.; but it refers most distinctly to the former warrant, and therefore virtually incorporates it; and the former warrant does contain all these formal requisites. Even supposing however that all these warrants are bad, still by the 18th section of 5 G. 2. c. 30. the Court may itself make a fresh commitment, if it appear, as it does in this case, that there is substantial ground for detaining the bankrupt in custody.

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LORD ELLENBOROUGH C. J. The 5 G. 2. c. 30. s. 16. enacts, that in case any bankrupt shall refuse to answer, or shall not fully answer to the satisfaction of the commissioners, or the major part of them, all lawful questions put to him by them, as well by word of mouth as by interrogatories in writing, he may be committed till he shall submit. Now here the bankrupt has refused to be sworn, or give an account of his property: must not, therefore, that be considered as a refusal to answer all the questions which the imagination of man could suggest, and as including a particular refusal to answer all lawful questions which the commissioners might put to him? If that be so, the first warrant of the commissioners would be good. But I think also that the second warrant of the commissioners is sufficient; for being made by the same persons, and directed to the same gaoler, and containing words distinctly referring to the first warrant, it virtually incorporates that warrant: then, if so, there is a recital of the jurisdiction of the commissioners, and a question and answer stated on the face of the commitment, and a commitment by the commissioners because that answer is unsatisfactory. That there-

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therefore is quite sufficient. But if both these warrants were bad, the Court might, under the 18th section, commit de novo. For the objection is merely formal; for there is first an absolute refusal to be sworn stated, and at the conclusion the bankrupt is committed until he shall submit himself, and full answer make to the questions so put to him as aforesaid, no questions having been previously set out. That is, therefore, a mere defect in form. And upon the whole face of these proceedings it clearly appears that there is substantial ground for detaining him in custody. He must therefore be remanded.

BAYLEY J. The bankrupt in this case states, as his reason for refusing to be sworn, that he had commenced an action for the purpose of disputing the validity of his commission; but that is not a good ground for such refusal, though it perhaps might supply a reason for an application to the Chancellor. Then the only question is, whether these warrants are sufficient. The ground of setting out the cause of committal in the warrant is, that the party may know for what he is committed. But here he does know it; for he must be sworn before he is examined, and it is stated he refused to be sworn. Now is not that tantamount to a refusal to answer all lawful questions; for how can it be necessary to put questions to a man who can only answer them on oath, and who refuses to be sworn. But I think also that if there be any defect, it is a defect in form; for from the first warrant of the commissioners it does appear that there is a substantial ground for a commitment; and if there be any defect in form, the Court may commit him de novo under sect. 18. As where a man is committed

mitted for felony, and on being brought up by a habeas corpus the warrant appears defective, the Court will, if there appears on the depositions a substantial charge, re-commit him, notwithstanding such defect. In this case, therefore, the bankrupt cannot be discharged.

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ABBOTT J. concurred. (a)

The Bankrupt was remanded.

(a) *Helroyd J.* was in the bail court.

SMITH and Another, Assignees of KIRKPATRICK,
a Bankrupt, against PLUMMER and Others.

ASSUMPSIT by the plaintiffs, as assignees of *John Kirkpatrick*, a bankrupt, to recover from the defendants the sum of 62*ol.* 13*s.* 7*d.* for freight and pierage for goods from *Saint Christopher's* to *London*. The defendants pleaded the general issue, with a notice of set-off for money lent and advanced to, and paid, laid out, and expended for the plaintiffs. The cause came on to be tried before Lord *Ellenborough* at *Guildhall*, at the first sittings in *Easter* term 1817, when a verdict was found for the plaintiffs for 62*ol.* 13*s.* 7*d.* subject to the following case:

The master of a ship has not a lien on the freight for his wages, or for his disbursements on account of the ship during the voyage, or for the premiums paid by him abroad for the purpose of procuring the cargo.

The plaintiffs are the assignees of *John Kirkpatrick*, a bankrupt, under a commission of bankruptcy dated the 25th of *June* 1811. The act of bankruptcy was committed on the 20th *June* 1811, the usual notice inserted in the *Gazette* on 6th *July* 1811, and the assignment to the plaintiffs duly executed on the 6th of *August* 1811. The said *John Kirkpatrick* before his bankruptcy was sole owner of the brig *Albion*, *Adam Little* master, which

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which arrived in *Saint Christopher's* in the month of *June* 1811, and there received on board a cargo of sugar and rum by the means and agency of *William Thompson* of that island, part of which cargo consisted of 30 hogsheads and one tierce of sugar, and 104 puncheons of rum, was consigned to the said defendants in *London* by the said *William Thompson*, by bills of lading dated one on the 24th and the other on the 26th *June* 1811, in the customary form, the freight and pierage of which, at the rate therein specified, amounted to 62*ol.* 13*s.* 7*d.* The *Albion* sailed from *St. Christopher's* 26th *June* 1811, and arrived in *London* on or about the 26th day of *August* 1811, with the said goods on board, and was reported on that day at the custom-house by the plaintiff's agents, and the goods warehoused at the *West India Docks*. The master when at *St. Christopher's* drew several bills of exchange for his disbursements on account of the said brig, and the premiums paid to *Thompson* for procuring his cargo, upon the said *John Kirkpatrick* as owner thereof, payable to the said *William Thompson* or order, and amounting altogether to the sum of 52*l.* 14*s.* 8*d.*; and which bills of exchange were duly presented for acceptance and payment, and were refused acceptance and payment by the said *John Kirkpatrick*, and have been since returned to the said *William Thompson* as indorser thereof under protest and have been paid by him, and of which due notice was given to *Little*. On the brig's arrival in *London* the master, in consequence of the refusal of the plaintiffs to pay his wages, which at the time of the bankruptcy of *Kirkpatrick* amounted to 26*ol.* and still amounts to that sum, or accept the bills drawn by him, or indemnify him against the same, refused to deliver

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up the bills of lading to the plaintiffs, and directed the *West India Dock Company* to detain the cargo, which was accordingly done, until the 29th *October* and 9th of *November* 1811, when the goods consigned to the defendants were delivered to the defendants, in consequence of the master taking off the stop on the goods at the said docks. Upon the arrival of the ship in the river *Thames*, viz. on the 29th *August* 1811, the master applied to the defendants as the consignees of the said goods, for an advance to enable him to defray the current expences of the said vessel, and the defendants did accordingly on that day advance to him the sum of 150*l.* for that purpose. On the 3d of *September*, the plaintiffs gave notice by their agents to the defendants, not to pay the freight due on the consignment to them, to *Little* the master; to which the defendants answered, that they were authorized by *Little* to receive the freight from the consignees, being principally due from themselves, and that, when received, they should hold it agreeable to his instructions, and pay it over to any one empowered by him to receive it, after deducting the 150*l.* advanced by them. On the 29th *October*, the plaintiffs by their agents gave a further notice to the defendants, that they, as assignees of *Kirkpatrick*, should hold them responsible for any money they had paid or should pay to *Little* on account of the freight, and on the 5th *November*, a more formal notice to the same effect signed by the plaintiffs themselves, was served upon the defendants. At the time of these transactions the plaintiffs and the bankrupt resided at *Liverpool*. *Little* is since dead, and neither he nor his personal representatives have taken up the bills. The defendants claim to retain 150*l.*, part of the amount of the

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the freight, &c. to satisfy the advance made by them to *Little*, the master, and the residue on the ground that the master had a lien thereon for his wages, and the amount of the said bills of exchange so drawn by him, and that he authorized them not to pay over such residue to the said plaintiffs.

The question for the opinion of the Court is, whether the plaintiffs are entitled to recover the whole or any part of the said sum of 62*ol.* 13*s.* 7*d.* If they are entitled to recover the whole, then a verdict is to be entered for that sum; if the defendants are entitled to deduct a set-off the sum of 15*ol.* advance by them, then a verdict is to be entered for the plaintiffs for 47*ol.* 13*s.* 7*d.*; and if the plaintiffs are not entitled to recover any part, then a nonsuit to be entered.

Parke, for the plaintiffs. There are two points in this case; 1st, That the master has no lien on the freight for his wages and disbursements; and, 2dly, That the defendants are not entitled to set off against the claim of the plaintiffs the sum of 15*ol.*, paid by them to the master on the 29th *August*. The first case upon this subject is *Wilkins v. Carmichael* (a), by which it was decided that the captain of a vessel had no lien on the ship for wages, or for stores furnished, and repairs done at his expence, in *England*. And this was decided on the ground that the law always considered the captain as contracting personally with the owner. In *Hussey v. Christie and Others* (b), it was laid down that the master had no lien on the ship for money expended or debts incurred by him for repairs done

(a) *Dougl.* 101.(b) 9 *East*, 426.

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during the voyage. That case came from the Court of Chancery, and was argued on the ground that as the master had a right to hypothecate the ship the lien ought to be allowed; but Lord *Ellenborough* C. J. said, that though by such hypothecation he might give to others a lien, it did not follow that he had one himself. The case is plain on principle; for the master is only the servant of the owners, and cannot therefore be entitled to the possession as against them so as to give him a lien. The case of a lien at common law is where the party being compelled to do that by which the debt arises, has for his security this right given to him. The lien of the factor depends on the custom of the trade. This falls within neither of these two; for the master is not compelled to expend the money or incur the debt; and there is no custom authorizing the lien. There is no authority which can be cited on the other side, except one *nisi prius* case of *White v. Baring* (c), and that was previous to *Hussey v. Christie*. Then if there be no lien on the ship or cargo, how can there be one on the freight? The master's authority to receive the freight, is not irrevocable, not being coupled with an interest. And if this claim were allowed, it might be productive of great inconvenience, for on a fresh master being appointed, the former one might refuse, on account of some claim like this, to deliver up the ship to the owners. As to the second point, the case does not state that this sum of 150*l.* advanced, was applied for the purposes of the ship, so that the owners are not liable for it. Nor can it be considered as a part payment of the freight; for at the time it was ad-

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(a) 4 *Esp. N. P. C.* 22.

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vanced the freight was not due. It must therefore merely be considered as an advance by the defendants to the master. Now the ship being in *England*, the master might have applied to the owners themselves. It is not even stated, that this money was necessary for the ship's disbursements, and for any thing that appears, it might have been advanced to the master to pay his own wages. Besides he had no authority to bind the assignees without their assent, and there they have not assented to this advance.

Richardson, contra. The bankruptcy can in this case make no difference. It took place 20th *June* 1811, at which time the vessel was at *Jamaica*, and the bills of lading are dated on the 24th *June*, and are subsequent to the bankruptcy. The assignees therefore who claim the benefit of the master's services in bringing home the ship, are not at liberty to say, that the bankruptcy places them in a better situation than the owner would have been. The master it must be allowed has no lien on the ship. But there has yet been no decision as to freight, and that case is distinguishable from the case of the ship. He is as to the ship merely the servant of the owners, and though he has a right to the possession of the ship as against others, has no right as against them. But as to the freight it is different; for he it is who enters into the contract for it, and it is not the ship alone which earns the freight, but the ship and the labour of the master jointly. The contract being therefore made by him, and the labour performed, and the sailors hired by him, and he having a right to maintain an action for the freight, are circumstances which materially distinguish this case from those cited. Here he

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has expended his own money for the necessary repairs of the ship, and paid a premium for obtaining this cargo. The owners therefore who claim the benefit, ought also to take the burthen. The justice of the case is clearly in favour of allowing the lien. As to the second point, the 150*l.* must be considered as a part payment of the freight, and being paid before notice from the owners, is a valid payment. The defendants were the consignees of the cargo, and being applied to by the master in that character, they paid this sum of money to him. This was on the 29th *August*, and no notice was given to them till *September* 3d. They are therefore at all events entitled to the benefit of this payment, in reduction of the plaintiff's demand, even supposing the opinion of the Court to be against them on the first point.

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Parke, in reply, was stopped by the Court.

LORD ELLENBOROUGH C. J. The owner has undoubtedly the primary right to receive the freight, and to sue the consignees of the goods for it: and whether the master has any right to receive the freight from them as against his owners will depend upon the question whether he has any lien upon the freight. In the first place, he has no lien on the ship for his wages; then as to the advances made abroad, they may indeed constitute a debt due to him from the owners, but he has no lien for them. The case of *Wilkins and Others v. Carmichael* (a) decided that a captain of a ship has no lien on the ship for wages, stores, or repairs done in *England*; and *Hussey v. Christie and Others* (b) decides that he

(a) *Dowd.* 101.(b) 9 *East*, 426.

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has none for money expended or debts incurred by him for repairs on the voyage. Then if he has no lien on the ship, as appears from these cases, he can have none upon the freight, as the lien on the freight is consequential to the lien upon the ship: and here there is the additional circumstance, that it is not proved that these advances abroad were made for the current expences of the ship. There is therefore in this case no pretence for the lien on the part of the master, through whom the defendant sets up this claim. The plaintiff therefore is entitled to recover.

BAYLEY J. I am of the same opinion, The master is the servant of the owners, and it is in his power, in order to protect himself against any loss from non-payment of wages, or for advances, &c. made by him abroad, to make a specific bargain with them, and require security for its performance. Liens only exist three ways; either by express contract, by usage of trade, or where there is some legal relation between the parties. In this case there is no express contract, nor any usage of trade, and the term legal relation applies only to those persons on whom the law throws an obligation to do particular acts, and in return for which, to secure payment, it gives them a lien; as, for instance, an innkeeper, carrier, and tailor. It has been decided that the master has no lien on the ship, either for repairs, wages, or advances. If, therefore, he has none on the ship, he can have none on the cargo; for they must stand on the same footing; and if any hardship arise to the master from this, it is owing to his having made an imperfect bargain with his owners. Then as to the 150*l.*, it is said that it is at all events
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paid to the master in his character of master, and by the consignee, and as part of the freight. It is paid to him in that character, and by the consignee; but it is not paid to him as part of the freight. For these reasons, it seems to me that the plaintiff is entitled to recover for the whole sum.

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ABBOTT J. I am also of opinion, on both grounds, that the plaintiff is entitled to recover. It has been already decided that the master has no lien on the ship for wages or other disbursements, and he has no right to sue for these against the ship in the Admiralty. These decisions seem to lead to the conclusion that he has no lien on the freight; for the right to receive the earnings of the ship must follow the right to the ship itself. As to the second point, it is said that the advance of the 150*l.* to the master was made to enable him to defray the current expences of the vessel; but it is not stated that these current expences were actually paid by him, and, for any thing that appears, the owners might have furnished him with money for that purpose. It is not necessary to say what the law would be if the money had been advanced abroad, and had been actually applied to the expences of the ship: for this takes place after the arrival of the ship in the river *Thames*; and it is quite sufficient for the decision of the present case to say, that an advance of money to enable the master to defray the current expences in *England*, cannot be considered as a part payment of freight to the owners by the consignees.

HOLROYD J. I am of the same opinion, that the master has no lien on the cargo, on the freight, or on

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the ship. The cases which have been cited expressly decide that he has no lien on the body of the ship in respect of wages, or money expended for stores or repairs, and the lien on the freight must stand upon the same ground. Then as to the 15*ol.*, I think that cannot be considered as a part payment of the freight, but as a loan to the master by the consignees.

Judgment for the Plaintiff.

Tuesday,
April 28th.

LUXMORE *against* ROBSON and Another.

Upon a covenant to repair and keep in repair during the continuance of the term, an action may be maintained for breaches committed before the term has expired.

DECLARATION in covenant by the assignee of the lessor, against the assignee of the lessee, upon a lease, the term in which had not expired. The breach assigned was upon the following covenant to repair: "that the lessee should and would well and sufficiently repair, and *keep* in proper repair, all and singular the buildings, walls, fences, and hedges thereon standing and being, or thereafter to be erected and made in and upon the said thereby demised premises, or any part thereof, during the continuance of the term." To this declaration there was a general demurrer. And now

Moore, in support of the demurrer. The covenant to keep in repair will be satisfied by the lessee's putting the premises into repair at any time during the continuance of the term. No right of action, therefore, vests in the lessor or his assignees before the term has expired. In *Main's* case (*a*), the following position is

[(a) 5 *Coke*, 21.

laid down, "A man leases a manor for years, and the lessee covenants to keep the houses of the manor, and as much as was in the manor, in as good plight as he found them, during the term: the lessee committed waste in the houses, and in cutting of oaks; the lessor brought an action of covenant, before the end of the term, for the oaks, because, for them, it was impossible that the covenant should be performed: *otherwise is it of the houses*; and therewith agree. *F. N. B.* 145. k. & 12 (13) E. 3. tit. *Covenant*, 2."

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LORD ELLENBOROUGH C. J. The common sense, the practice, and the general convenience of mankind, require that a construction different from that in the case cited should be adopted. By the terms of the covenant the lessee is bound to *keep* the premises in repair; then to keep them in repair he must have them in repair at all times during the term; and if they are at any time out of repair, he is guilty of a breach of covenant, which is the proper subject of an action.

BAYLEY J. Neither common sense nor any principle of law will lead to the conclusion which the passage cited from the 5 *Rep.* would seem to warrant. I therefore think, there must be judgment for the plaintiff.

ABBOTT and HOLROYD Js. concurred.

Judgment for the Plaintiff.

Manning, who was to have argued in support of the declaration, stated, that on referring to the case in *F. N. B.*, cited as an authority for the position laid down in *Main's case*, it appeared that no judgment

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whatever had been pronounced; and, therefore, what was said by the Court could be considered as no more than an obiter dictum; and that in 2 *Roll. Rep.* 347. *Doderidge J.* denied the case to be law.

Friday,
May 1st.

CLARKE against RIPPON and Another.

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plies to writs
of error, and
therefore a
writ of error
does not abate
by the death
of one of several
plaintiffs in
error.

ASSUMPSIT upon a promissory note dated 24th *June* 1815, whereby defendant promised twelve months after date to pay to plaintiff the sum of 278*l.* 11*s.* 6*d.* The action was commenced in *Hilary* 1817, and the plaintiff in *Trinity* term following, obtained judgment; on which a writ of error was brought by the defendants returnable in the Exchequer chamber, which was regularly proceeded with, and the transcript was carried over into the Exchequer chamber. In *October* 1817, and before the assignment of errors, one of the plaintiffs in error died.

Manning, for the defendant in error, obtained a rule in this court, calling upon the surviving plaintiff in error to shew cause why a remittitur should not be entered on the roll, and why execution should not issue upon the judgment obtained in this court. The rule was moved for, on the ground that a writ of error abated by the death of one of the plaintiffs in error before assignment of errors; and for this he cited *Tidd's Practice*, vol. 2. p. 1194.

Deacon shewed cause. This case falls within the 8 and 9 *W. 3. c. 11. s. 7.* by which it is enacted, that "if there be two or more plaintiffs or defendants, and one
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or more shall die, if the cause of such action shall survive to the surviving plaintiff or plaintiffs, or against the surviving defendant or defendants, the writ or action shall not therefore be abated, but such death being suggested upon the record the action shall proceed." Here then the defendant in error should have caused a suggestion of the death to be entered on the roll, and given a rule to the surviving plaintiff in error to assign the errors. And though *Tidd* lays the law down differently in the passage cited, yet he supports it only by cases, all of which were decided previously to the passing of the statute. They therefore do not affect the question, and by the fair construction of the statute, with which the practice in the Exchequer chamber agrees, the writ clearly does not abate.

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 against
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Lord ELLENBOROUGH C. J. This case appears to fall within the meaning and words of the act of parliament. The proceeding is an action which is commenced by a writ, and the cause of the action is the damage sustained by the parties from the error in the previous judgment, and this damage equally attaches on the survivor in this as in any other action. The case therefore falling within the statute referred to, this rule must be discharged.

Rule discharged.

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The KING against The Justices of DEVON.

The 37 G. 3. c. 143. s. 1., by which the justices at their respective petty sessions within the divisions, districts, and other places of the several counties of England, are authorized to appoint examiners of weights and balances, extends only to such divisions, &c. as were known and recognized at the time when the act passed; and, therefore, such appointment made at a petty sessions, by two justices for a district which they had, without the consent of the other magistrates, created within the last five or six years, was held to be illegal.

MANNING in last *Michaelmas* term, obtained a rule nisi for a mandamus to the justices of the county of *Devon*, commanding them to allow *John Richards Reid*, the examiner of weights and measures, for the division or district of *Ilfracombe* and *Parracombe* in the said county, a reasonable recompense or satisfaction for his trouble in the execution of the said office. The affidavits on which the rule was obtained stated, that the said *John Richards Reid* was duly appointed and sworn into the office at a petty sessions held before two magistrates in *July* 1813: that the district for which he was so appointed consists of thirteen parishes: that lawful measures, &c. were provided for him, and paid for out of the county rate: that he continued duly to execute his office, and to receive the salary out of the county rate, for two years and upwards; and that since that time, the magistrates had wholly refused to make him any recompense, (although he had continued to perform the duties of the office,) on the ground that they would not recognize the establishment of a new division: that the district for which he was appointed, was in length twenty miles and in breadth five miles: that the district for which the justices of the county contended, comprizes the three hundreds of *Brawnton*, *Fremington*, and *Sherwill*, containing forty-four parishes, and being twenty-five miles in length and eighteen in breadth; and that the appointment of one inspector of weights and measures for so great an extent of country would be highly inconvenient.

The affidavits in answer to the rule, stated, that the division of *Braunton* had as far back as could be remembered consisted of the three hundreds of *Braunton*, *Sherwill*, and *Fremington*, and all magisterial business for that division had always been done at *Barnstaple*: that about five or six years ago, two magistrates, without the assent or knowledge of the other magistrates of the division, had attempted to create this new division within the former one, which was at first called by them the division of *Trentishoe*, and afterwards that of *Ilfracombe* and *Parracombe*, and that they had appointed this inspector of weights and measures: that there was no necessity for such appointment, the whole division of *Braunton* being thinly inhabited, and there being already similar officers appointed at the three principal places therein, viz. one at *Barnstaple*, appointed by the magistrates of the division, the second, at *Ilfracombe*, by Sir *Bouchier Wrey*, the lord of the manor there, and the third for the hundred of *Braunton*, at the court-leet of Lord *Courtenay*. The case having stood over till the present term,

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Tancred shewed cause. This case depends on the construction of two statutes. By the first, 35 G. 3. c. 102. s. 1., a power was given to the justices of the peace at their quarter sessions to appoint a person to examine weights and balances; and after proceeding to state the powers and duties of the person so to be appointed, the fourth section authorized the magistrates at the quarter sessions to allow him a reasonable recompense or satisfaction for his trouble out of the county rate. The 37 G. 3. c. 143. s. 1. repeals so much
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of the former act as relates to this power of appointment, and enacts, "that it shall and may be lawful to and for the justices of the peace at their respective petty sessions within the divisions, districts, and other places of the several counties of *England* and *Wales*" to make such appointment. So that it appears that by the law, as it now stands, the justices in their petty sessions are to appoint, and the quarter sessions to give the reasonable recompense. Now the question is, was this appointment a legal one? The magistrates can have no power to create in this way a new district, within which they may hold a petty sessions, and where they may make these appointments. It appears from the affidavits, that the supposed division of *Ilfracombe* and *Parracombe* had no existence at the time when 37 G. 3. c. 143. was passed, having only been divided from the other district for about five or six years. And the act can have reference only to "districts, divisions, and other places" then existing. There is no necessity for the present appointment, for there are already three similar officers within the district.

He was then stopped by the Court.

Scarlett and *Manning*, contra. The words of the act are general. The justices at their petty sessions are to appoint the officer within the divisions, districts, or other places; and though perhaps the word "division" may have a particular and definite meaning, and may be referred to the time of the statute of 33 Hen. 8. c. 10. whereby the magistrates were authorized to divide themselves according to hundreds, wapentakes, &c.; yet the other words, "districts or other places," are quite general, and will cover the present case. The object

object of the second statute was to give the appointment to the magistrates immediately residing on the spot, who would be more likely to be acquainted with the local circumstances requiring such appointment. Here it appears the district consists of thirteen parishes, and extends over a considerable space; and of the other three officers, two are not under the controul of the magistrates, being appointed by individuals, and the third, who is appointed by the magistrates, is at a considerable distance. Besides, here the salary has been paid by the magistrates for two years, and that must be considered as a recognition by them of the appointment. And then, after the labour has been performed under this implied recognition, the magistrates cannot turn round and refuse to make the reasonable compensation required by 35 G. 3. c. 102. on the ground that the appointment originally was illegal.

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Lord ELLENBOROUGH C. J. This is an application to the Court to compel the sessions to make a reasonable compensation out of the county rate to an officer whom they think unnecessary. It appears that about five or six years ago two magistrates separated themselves from the rest, and took under their jurisdiction a particular district, which before that period had formed part of another and larger division. For this they have held a petty sessions, and at that petty sessions they have made this appointment. The question is, whether that act is a legal one; the act of the 37 G. 3. c. 143. having given the power of appointment to the justices at their respective petty sessions within the districts, divisions, and other places of the several counties of *England and Wales*. What the legal qualities of a division

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vision may be, is perhaps doubtful, but it is at least clear that the division must be one existing at the time of the act. For the act must be construed so as to have been capable of being carried into immediate effect when it passed. Now how could it have been carried into immediate effect in this district of *Ilfracombe* and *Parracombe*, when the district itself had no existence at the time of the passing of the act of the 37 G. 3. c. 143.? If so this cannot be a legal appointment, being a burthen thrown on the public by persons without any jurisdiction; and the Court, therefore, will not enforce the payment of the salary of this officer by mandamus.

BAYLEY J. I am of the same opinion. The body of magistrates in a large division cannot be subdivided in the way stated on the face of these affidavits. The subdivision should at least be made by the consent of the whole body at their petty sessions. For if these two magistrates may thus subdivide themselves, any other two might do the same, and so the whole division might be separated into small districts, and great inconveniences might be produced. There is no jurisdiction given by the act to the justices to appoint this officer, except at a petty sessions, and unless that petty sessions be within a known and recognized division. That is not so in this case, for this is a petty sessions held within only a limited part of the division. The appointment, therefore, being illegally made, this rule must be discharged.

ABBOTT and HOLROYD Js. concurred.

Rule discharged with costs.

END OF EASTER TERM.

C A S E S

ARGUED AND DETERMINED

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IN THE

Court of KING's BENCH,

IN

Trinity Term,

In the Fifty-eighth Year of the Reign of GEORGE III.

COPELAND *against* STEPHENS. (2/

ACTION of covenant. The plaintiff, in *Michaelmas* term 1816, declared, that by an indenture, dated 9th June 1813, made between her and one *Robert Thompson*, she demised to the said *Robert Thompson*, his executors, administrators, and assigns, a certain messuage, &c. for seven years, at the rent of 57*l.* 15*s.* per annum, to be paid by four equal quarterly payments, which the said *Robert Thompson* covenanted, for himself, his executors, &c., well and truly to pay or cause to be paid. That the said *Robert Thompson* entered and became possessed of the said demised premises, and that afterwards, on the 3d May 1814, all the

The general assignment of a bankrupt's personal estate under his commission, does not vest a term of years in the assignees, unless they do some act to manifest their assent to the assignment as it regards the term, and their acceptance of the estate, rents, &c. And therefore till some act of this sort is done by them,

the term still remains in the bankrupt, and he is liable to the payment of rent accruing due subsequent to the bankruptcy.

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estate, right, title, interest, term of years then to come and unexpired, profit, claim, and demand whatsoever of the said *Robert Thompson* to the demised premises by assignment thereof, legally came to and vested in the defendant, who entered and became possessed and continued possessed till the time of action brought. The declaration then charged a breach of covenant, in the defendant not having paid a quarter's rent due 29th September 1815, amounting to 14*l.* 9*s.* 8*d.*

Plea, that after defendant became assignee of the demised premises, to wit, on the 1st June 1815, he became a bankrupt, and that afterwards, and before any part of the said sum of 14*l.* 9*s.* 8*d.* became in arrear and unpaid, the commissioners, on the 1st July 1815, by indenture between themselves and one *William Tate*, assigned to the said *William Tate*, (who had been before duly chosen assignee of the estate and effects of the said defendant,) all the goods, chattels, merchandises, effects, debts, sums of money, and all other personal estate whatsoever, and all the estate, right, title, interest, equity of redemption, property, claim or demand whatsoever of or in the said demised premises belonging to the defendant. By virtue of which all the estate, interest, and term of years then to come and unexpired of him the said defendant of, in, to, or out of the said demised premises became and were from thenceforth and still are legally assigned to and vested in the said *William Tate* as such assignee as aforesaid.

The plaintiff replied, that the said *William Tate* did not, before the said sum of money in the said declaration mentioned became in arrear and unpaid, or afterwards, accept the said indenture of lease, or the benefit therefrom, as part of the estate and effects of the said defendant,

defendant, nor enter into or become possessed of the said premises thereby demised. To this replication there was a general demurrer and joinder; and the case was argued in last *Michuclmas* term, by

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Deacon, in support of the demurrer. The distinction between the liability of the original lessee and that of the assignee of a term is, that the first is liable always by reason of the privity of contract; the latter, only by reason of the privity of estate. The moment therefore that the privity of estate is gone, his liability ceases to exist. Here the defendant is sued as assignee of the term originally demised to *Robert Thompson*, and the question is, whether the privity of estate still subsists. It was not necessary to aver in the plea the entry of *W. Tate*, the assignee of the bankrupt. For when an assignment to a third person, not a party to the suit, is pleaded, it is not necessary to aver entry. In *Cook v. Harris* (a), Lord Holt says, "The ancient method of pleading assignments was *virtute cujus* the assignee assented and was possessed; but that is disused now, for the assignee has the estate in him before entry, though not to bring trespass." And there the assignee was himself the party to the suit; so that that case is stronger than the present. The lessee has a right and an estate in him before entry, which he may grant or assign to another. (b) *Saffyn's* case. (c) Then as large an interest as passes to the lessee before entry, will pass to his assignee, or from one assignee to another, before entry, and there will not remain with either the lessee or the mesne assignee such a privity of estate with the lessor as would entitle the latter to sup-

(a) 1 *Ld. Raym.* 367.(b) *Litt. sect.* 66. 289. *Co. Litt.* 46. b.(c) 5 *Cabr.* 124. b.

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port an action of covenant against them. Here the commissioners have assigned all the bankrupt's interest to the assignee under the commission. The bankrupt then has no privity of estate left, and being only assignee of the term, and not lessee, there is neither privity of estate nor privity of contract; and consequently this action of covenant cannot be maintained against him. In *Eaton v. Jaques* (a), an entry was certainly held to be necessary. But that case has been overruled in *Westerdell v. Dale* (b), and by Lord Kenyon in *Stone v. Evans*. (c) And the same seems to have been taken as clear law in *Sparkes v. Smith* (d), and *Pilkington v. Shaller*. (e) In *Taylor v. Shum* (f) it was admitted, that an assignment to a beggar, or to a person leaving the kingdom, was valid, so as to divest the estate from the original assignee: yet that might lead to great fraud. So it was also decided in *Walker v. Reeves* (g); and in *Odell v. Wake* (h) the entry of the second assignee was held not to be necessary. Here the bankrupt has not divested himself of the term, but the law has done it for him. And it is not necessary for him to shew that the assignee under the commission has entered. If the assignee had entered, he would then have been liable for the rent. And therefore in bringing the action against such assignee, it would be necessary for the lessor to aver an entry by him. But here it is not necessary for the defendant to shew who is liable. It is sufficient for him to shew that he is not. An assignee

(a) Dougl. 454.

(b) 7 T. R. 312.

(c) *Sittings at Westminster after Trinity term 39 Geo. 3. Woodfall, Landlord and Tenant*, 103.

(d) 2 Vern. 275.

(e) 2 Vern. 374.

(f) 1 Bos. & Pull. 21.

(g) Dougl. 461. in notis.

(h) 3 Campb. N. P. 394.

of a bankrupt is in a different situation from an assignee of a term. It has been determined that he is not liable unless he accepts. *Bourdillon v. Dalton* (a), *Turner v. Richardson*. (b) But this is a peculiar advantage super-added to the character of assignees of bankrupts. It cannot alter the situation of the bankrupt, who by the assignment is equally divested of the property, although it is cast on his assignee with circumstances of unusual advantage. The bankruptcy is a forfeiture of all his property, and vests it in his assignees. *Cooper v. Chitty*. (c) Suppose a debt due to a bankrupt be attended by a duty, for which reason the assignees might not choose to sue for it; can the bankrupt sue for it himself? Or suppose goods belonging to the bankrupt be in the hands of a third person, subject to a lien, which the assignees will not discharge; can the bankrupt discharge the lien and bring trover for the goods? Yet, if all that did not go to the assignees remained with the bankrupt, as is stated in *Turner v. Richardson*, the right to sue for the debt and the right to the possession of the goods would, in the cases put, be in the bankrupt. But that is not so. The bankruptcy and assignment have therefore divested all the interest in this term of years, which is a mere chattel interest, out of the defendant. [Abbott J. The declaration avers, that the bankrupt has continued in possession.] The only way in which the continuance in possession of the bankrupt could become material would be, that such fact might perhaps support a replication per fraudem to the assignment. *LeKeux v. Nash*. (d) But here the assignment is by act of law, and fraud is wholly out of the question.

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(a) *Peake, N. P. Cas.* 238.(b) 7 *East*, 335.(c) 1 *Burr.* 20. 2 *Bl. Com.* 485.(d) 2 *Str.* 1221.

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Then the interest having once been divested out of the bankrupt, there has been nothing to revest it in him. The refusal, actual rejection, and disclaimer by his assignees would not do so, even if that had been stated in the replication, which it is not. And the lessor is not damnified by this: for he may distrain for his rent, if the premises continue to be beneficially occupied; and if not so occupied, he may then recover the possession. At all events, he has an action against the original lessee by reason of his privity of contract.

Peake, contra, admitted that the question was, whether the privity of estate between the plaintiff and defendant still remained. There is a material distinction between *Walker v. Reeves* and *Taylor v. Shum*, the cases cited, and the present case. For the assignee here, is the assignee of a bankrupt who is not liable unless he accepts. If he does not accept, no interest passes to him by the assignment. That is not so with the assignees in the other cases. The moment a privity of estate between the lessor and second assignee, is created, the privity of estate between the lessor and first assignee ceases; but not till then. In *Bourdillon v. Dalton*, the assignees were held not liable, they not having entered; no interest therefore vested in them: If it had, the very act of vesting would have created a privity of estate, and made them thereby liable. In *Wadham v. Marlowe* (a) the bankrupt had obtained his certificate. [*Bayley* J. That would make no difference where the rent had accrued due after the bankruptcy. Lord *Mansfield* in that case goes on the ground that the privity of estate was gone.] By the statute of the

(a) 3 East, 314.

49 G. 3. c. 121. s. 19. it is enacted, "that when any bankrupt is entitled to a lease or assignment for a lease, and the assignees shall accept the same and the benefit therefrom as part of the bankrupt's estate and effects, the bankrupt shall not be liable to pay the rent accruing due after such acceptance, nor be liable to be sued for the non-observance of the covenants contained in such lease." Now here it is observable, that the event in consequence of which the liability of the bankrupt is removed, is the acceptance by his assignees. If therefore they do not accept, it would seem to follow that his liability remains. For the question is, how has the estate passed out of the bankrupt. It cannot be out of him till it is vested in some one else. Then the privity of estate must continue until the other side have shewn a termination of it. This they have not done. It does not stand on the omission in the plea to state an acceptance by the assignees, but the non-acceptance is stated as a fact in the replication.

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Deacon, in reply, adverted to the latter part of the 19th section of 49 G. 3. giving a power to the lessor to apply to the Chancellor in case the assignees of a bankrupt refuse to determine whether they will or will not accept the lease, and contended that this shewed the object of the whole section to be for the benefit of the lessors in such cases, and to have no reference to the liability of the bankrupt in cases where the assignees did not accept. In *Bourdillon v. Dalton*, the assignees were the defendants in the cause. Here they are strangers. Although, therefore, they were held to be not liable in that case, it will not follow as a consequence that the bankrupt is liable here. They

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may have the estate legally in them; although from their peculiar situation they hold it under peculiar advantages to themselves. [Abbot J. It is remarkable, that in the part of the nineteenth section, to which you have alluded, the legislature do not say that the lessor shall, in his application to the Chancellor, pray that the assignees may surrender the estate, but only that they shall deliver up the lease and the possession of the premises. Now if it had been considered that they had any estate in them, the legislature would probably have directed that they should be compelled to surrender it. That form of expression however, has not been there used.]

Cur. adv. vult.

Lord ELLENBOROUGH C. J. in this term delivered the judgment of the Court.

This was an action of covenant, brought in *Michaelmas* term 1816, by the plaintiff *Sarah Copeland*, upon a lease for years of a messuage and other premises, made by her to one *Robert Thompson*, rendering rent quarterly, and containing a covenant by *Thompson* the lessee, for himself and his assigns, to pay the rent at the days appointed. The plaintiff, having in her declaration set forth the lease, and averred the entry and possession of *Thompson* the lessee, alleged further, that the estate of *Thompson* was assigned to the defendant, and that the defendant thereupon entered and became possessed of the demised premises; and then charged, as a breach of the covenant, the non-payment of one quarter's rent, which had accrued due at *Michaelmas* 1815, and after the assignment to the defendant. To this declaration the defendant pleaded, that before the rent became due, he became a bankrupt; that a commis-

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sion of bankrupt afterwards, to wit, on the 6th of *June* 1815, issued against him, and that the commissioners therein named afterwards, to wit, on the 1st *July* 1815, by an indenture made between them and one *William Tate*, bargained, sold, assigned, and transferred to the said *William Tate*, who had been chosen assignee under the commission, all the goods, monies, debts, and personal estate of him the said defendant, in general terms, in trust for *Tate* and the other creditors seeking relief under the commission: and then averred, that by virtue of that indenture, and of the commission and proceedings under it, all the estate, interest, and term of years of him the said *William Stephens* in the demised premises became, and were, and still are legally assigned to and vested in the said *William Tate*. To this plea the plaintiff replied, that the said *William Tate* did not at any time before the rent in demand became due, or afterwards, accept the indenture of lease, or the benefit therefrom, as part of the estate and effects of the defendant, nor enter into or become possessed of the demised premises for the residue of the term. And upon this replication the defendant demurred, and the plaintiff joined in demurrer.

Upon these pleadings the question is, whether the privity of estate, which once existed between the plaintiff lessor and the defendant assignee, of a lease for years, has been destroyed by the legal effect and operation of the actual execution of a deed of general assignment of the personal estate of the defendant, made under a commission of bankrupt against him; such deed appearing to have been executed by the commissioners, and not being averred to have been executed by the assignee therein named, and it not being shewn that

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the assignee therein named had any notice of the existence of the term; and it being admitted that he has not accepted the lease or term, or entered into or become possessed of the demised premises. The case was very well argued before us; and in support of the demurrer it was contended, first, that actual entry or possession by the assignee of a term of years is not necessary to perfect the deed of assignment and vest the estate: and, secondly, that in the case of an assignment under a commission of bankrupt, an actual renunciation of a term for years which had been vested in the bankrupt is necessary to prevent the estate from vesting in the assignees, and that a forbearance to accept the term or to enter or take the issues of the land, being merely negative acts, are not equivalent to an actual renunciation. To sustain the first of these propositions, the cases of *Walker v. Reeves* (a), and *Pilking頓 v. Shaller* (b), the dictum of Lord Holt in *Cook v. Harris* (c), and the opinion of Lord Kenyon in *Westerdell v. Dale* (d), and *Stone v. Evans*, quoted in Mr. Woodfall's *Treatise on the Law of Landlord and Tenant*, were cited and relied on; and reference was also made to *Littleton*, sect. 66 and 289, and to 5 Co. 124. b., as shewing the nature of the interest that passes to a lessee for years before actual entry. In support of the second proposition some authorities were quoted, to shew that all the personal estate of the bankrupt passes by the assignment of the commissioners (which, generally speaking, is indisputable,) and it was inferred from thence, that actual renunciation must be necessary to prevent this

(a) Dougl. 461.

(b) 2 Vern. 374.

(c) 1 Ld. Ray. 367.

(d) 7 T. R. 312.

effect

effect as to a lease for years. The 19th section of the stat. 49 G. 3. c. 121. was also referred to, and was supposed to shew that no interest remained in the bankrupt. It was admitted, however, and indeed it could not be denied, that an actual renunciation would relate back, so as to make the deed inoperative from the beginning. The argument for the plaintiff was chiefly directed to the second of the before-mentioned propositions. It was urged that the case of *Walker v. Reeves* applied only to a perfect assignment: and it was contended, upon the authority of the cases of *Bourdillon v. Dalton* (a), *Turner v. Richardson* (b), and *Wheeler v. Bramah, Assignee of Borman* (c), that the assignees of a bankrupt are not bound to accept a term of years, which may be burdensome instead of profitable to their trust; and that unless they do so, no estate passes to them by the assignment of the commissioners, and, consequently, that the estate and term still remain in the bankrupt, and the privity of estate between him and the lessor remains also. It was also contended, that the inference to be drawn from the 19th section of the statute before mentioned was favourable to this proposition; and it was urged that as the legislature has thereby declared that a bankrupt shall not be liable to the rents or covenants after his assignees have accepted the term, it must be understood that he is liable if they do not accept it. We think the statute referred to does not lead to any clear inference on either side of the question in this case. And if it were necessary, on the present occasion, to give an opinion on the first proposition advanced in support of

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(a) *Peake, N. P.* 238. and 1 *Esp. N. P. C.* 223.

(b) 7 *Rest*, 335.

(c) 3 *Compt.* 340.

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the demurrer, viz. that no actual entry or possession by the assignees is necessary to perfect the assignment of a term of years, we should pause until the determination of the case in *Williams v. Bosanquet*, in which that proposition is directly questioned, and which is now pending before all the Judges. But we think it is not necessary to do this; because we are of opinion that the general assignment of a bankrupt's personal estate under his commission, does not vest a term of years in the assignees, unless they do some act to manifest their assent to the assignment as it regards the term, and their acceptance of the estate; and upon this ground alone, our judgment in the present case is given. The case is free from any question as to the acts, that may be evidence of, or may amount to, an acceptance, entry, or possession; it being alleged in the replication, and admitted by the demurrer, that the assignee under the defendant's commission has neither accepted, entered, nor become possessed. An assignment by commissioners of bankrupt is the execution of a statutable power, given to them for a particular purpose, viz. the payment of the bankrupt's debts. Nothing passes from them, for nothing was previously vested in them. Whatever passes, passes by force of the statute, and for the purpose of effecting the object of the statute. And therefore the assignees of a bankrupt are not bound to accept a term of years, that belonged to the bankrupt, subject to the rent and covenants; for the object of the statute and of the assignment being the payment of the bankrupt's debts, and the assignees under the commission being trustees for that purpose; the acceptance of a term, which, instead of furnishing the means of such payment, would diminish the fund arising from other sources,

sources, cannot be within the scope of their trust or duty. And in this respect, such a term differs from the debts of the bankrupt and his unencumbered effects and chattels. The three cases of *Bourdillon v. Dalton*, *Turner v. Richardson*, and *Wheeler v. Bramah*, cited on the part of the plaintiff, were decided upon this ground. The right to accept or refuse being established by these reasons and authorities, there appear to be three modes in which the legal effect of an assignment under a commission of bankrupt, with reference to a term of years, may be considered. First, does it pass the estate immediately to the assignees, defeasible upon their actual refusal to accept a renunciation of it? Or, secondly, does it pass the estate immediately to the assignees, defeasible upon their neglect or forbearance to do some act manifesting their acceptance of it? Or, thirdly, is its effect suspended until acceptance? The first of these three modes is liable to this peculiar objection; viz. that it does not appear by any reasoning or authority how or to whom such actual renunciation is to be made, whether to the commissioners, to the lessor, whose residence may be at a distance, or unknown, or to the bankrupt; and both the first and second are liable to objection from the inconvenience and confusion which must ensue for some period following the execution of the assignment; and neither of them appears to us to be warranted by any principle or analogy of law. Whereas, the suspension of the effect of the deed until acceptance of the term by the assignees will be analogous to the case of a lease for years made by the owner of land at the common law. The execution of such a lease furnishes an inception of title in the intended lessee, which he may

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or may not adopt and perfect at his election; for no person can be compelled to take an estate against his will. If he does elect to adopt and perfect the deed, then upon such election it becomes available from the time of execution; and therefore it is said, that the intermediate death of the lessor, whether he be sole or joint tenant, does not avoid the lease, nor prevent the lessee from perfecting it by an entry into the land. In like manner, if a person, who has delivered a deed as an executor, to be handed over to the party for whose use it is made, upon the performance of some condition, happen to die before the performance of the conditions, and the condition be afterwards performed, the deed is available notwithstanding the death of him that made it. And if the operation of the deed of assignment be suspended, the estate must necessarily remain in the bankrupt during the period of suspension; for it cannot be in abeyance, and must exist in some person. And the respective situations of the bankrupt and his assignees, will be similar to those of a lessor and his lessee for years before entry. The assignees in the one case, like the lessee in the other, may have an interest in the term, or *interesse termini*, as it has been called, (an expression applied also to denote the interest of a lessee in a term that is to commence in future.) But this, although it may be a thing capable of being granted over, is no part of the estate, as appears by the doctrine of *Littleton*, sect. 459. that a release by lessor to his lessee for years before entry by the latter, will not operate to enlarge the estate, and also by what is said in 5 *Co.* 124. b. and in the conclusion of the sixth resolution in *Isham v Morrice* (a) that if the lessor grant the reversion

(a) *Crs. Car.* 109.

by that name before entry of the lessee, nothing passes thereby. In such case therefore the whole estate remains in the lessor; for if the lessee had any estate before entry, the release of the lessor might operate to enlarge it; and there would be a reversion in the lessor, which might be granted by that name. And as the whole estate remains in the lessor until entry, or some other act of the lessee, subject to the right of the lessee to have the land by his entry, and thereby vest the estate of the term in himself; so we think the whole estate remains in the bankrupt until acceptance by the assignees, subject to their right to have the land by their acceptance of the assignment, and thereby to give effect to the deed and vest the estate in themselves. The right in the land, according to the expression of *Littleton*, sect. 289, or the right to have the land, according to the expression of the same author on the same subject in sect. 66, although they may be capable of grant or assignment, are matters distinct from the estate in the land. The right is often in one person, and the estate in another, as in cases of disseisin. And the action of covenant against the assignee of a lease is founded upon privity of estate, and not upon privity of right, if there be any such thing. This analogy will remain, although upon a further consideration of the subject of entry, it should be held, that an actual entry into the land may not in all cases be necessary to perfect a lease or an assignment, but that some other act denoting an assent to the conveyance may be equivalent thereto. And it may be proper to mention again, that the dicta relating to entry by the lessee, have been referred to by the Court, in the way of analogy and for the purpose of illustration only; and that the judgment

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ment of the Court in this case is founded upon its own special and peculiar facts; viz. a general assignment under a commission of bankrupt, not accompanied or followed by notice of the existence of the term, nor by any act of acceptance, entry, or possession. Something beyond the bare execution of a deed on the part of the grantor is necessary to pass the estate of an assignee. It is not necessary now to decide what may be enough for that purpose, because in the present case there is not any thing at all beyond the mere execution of the deed of assignment. For these reasons, we are of opinion that the replication in this case is a sufficient answer to the plea, and that our judgment must be for the plaintiff.

TOWNSEND and Another *against* WILSON.

A power of sale is reserved to three trustees and their heirs; one of the trustees dies, and the the two surviving trustees execute the power: Held, that the power was not well executed; although the deed expressly provided that the money arising from the sale should be entrusted to the trustees for the time being, and although it also reserved a power, in case of death, &c. to appoint new trustees.

BY indentures of lease and release, of the 10th and 11th days of *October* 1782, the release made between the Rev. *Osmond Beauvoir* D. D. of the first part, *Mary Sharpe* spinster of the second part, and the Right Hon. Sir *William Lynch* Knight, Sir *Charles Gould* Knight, and *Thomas Edwards Freeman* Esq. of the third part, (being the settlement made previously to and in contemplation of a marriage then intended between the said *Osmond Beauvoir* and *Mary Sharpe*,) she the said *Mary Sharpe* granted, released, and confirmed unto the said Sir *William Lynch*, Sir *Charles Gould*, and *Thomas Edwards Freeman*, and their heirs, all that the reversion or remainder in fee-simple of her

the

the said *Mary Sharpe* expectant upon and to take effect in possession immediately after the decease of *Joshua Sharpe*, in the said indenture named, of and in the several lands and hereditaments situate at *East Barnet*, in the county of *Herts*, To hold the same unto the said Sir *Wm. L.*, Sir *C. G.*, and *T. E. F.*, their heirs and assigns, to the several uses following; that is to say, to the use of the said *Mary Sharpe* and her heirs until the marriage, and after the solemnization thereof to the use of the said *Osmond Beauvoir* and his assigns, for the term of his natural life, without impeachment of waste; with remainder to the use of the said Sir *W. L.*, Sir *C. G.*, and *T. E. F.*, and their heirs, during the life of the said *Osmond Beauvoir*, in trust to preserve the contingent remainders thereafter limited; with remainder to the use of the said *Mary Sharpe* and her assigns, for the term of her life, without impeachment of waste; with remainder to the same trustees and their heirs, during her life, to preserve the contingent remainders; with remainder to the children of the marriage in tail male; with the ultimate remainder to the right heirs of the said *Mary Sharpe*. And in the said indenture of lease and release are contained powers and covenants in the words following, viz. " Provided always, that it shall and may be lawful for the said Sir *W. L.*, Sir *C. G.*, and *T. E. F.*, and their heirs, after the solemnization of the said intended marriage, from time to time, by and with the consent of the said *Osmond Beauvoir* and *Mary Sharpe*, his intended wife, or of the survivor of them after the decease of either of them, to be testified by some deed or instrument to be sealed and delivered by them respectively in the presence of, and to be attested by two or more credible witnesses, to

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make sale of all and singular the said messuages, lands, &c. hereinbefore granted, or any part thereof, with their and every of their appurtenances, unto any persons whomsoever, for such price in money as to the said Sir *W. L.*, Sir *C. G.*, and *T. E. F.*, or their heirs, shall, with such consent as aforesaid, seem meet and reasonable; and for that purpose for them the said Sir *W. L.*, Sir *C. G.*, and *T. E. F.*, and their heirs, by and with such consent as aforesaid, by any deed or deeds, to be by them sealed and delivered in the presence of and attested by two or more credible witnesses, to revoke, determine, and make void all and every the uses, estates, trusts, &c. hereinbefore created and declared, of and concerning the hereditaments and premises hereinbefore by these presents granted, and which shall be so sold. And by the same or any other deed or deeds, writing or writings, to be sealed and delivered as aforesaid, to appoint the said hereditaments and premises, whereof the uses shall be so revoked, either unto such purchaser or purchasers, and his or their heirs, or otherwise to limit, create, declare, and appoint such new or other use or uses, trust or trusts, of and concerning the same hereditaments and premises, the uses whereof shall be so revoked, as shall be necessary for the executing, effecting, and completing such sale and disposition. And it is hereby declared and agreed, by and between the said parties to these presents, that the monies arising by such sale or sales shall be paid into the hands of them the said Sir *W. L.*, Sir *C. G.*, and *T. E. F.*, or the survivor or survivors of them, or the executors, administrators, or assigns of such survivor, and they and he are and is hereby accordingly authorized and empowered to receive the same and every part or parcel thereof:

Provided always, and it is hereby further declared and agreed, by and between all the said parties hereto, that in case any of them the said Sir *W. L.*, Sir *C. G.*, and *T. E. F.*, shall happen to die during the continuance of the said trusts, or shall desire to relinquish or be discharged therefrom, then and in either of the said cases it shall be lawful to and for the said *Osmond Beaufort* and *Mary Sharpe* jointly, or the survivor of them, during his or her life, and after the decease of the survivor of them to and for the executors or administrators of the said *Mary Sharpe*, by writing under his, her, or their hands respectively, and attested by two or more credible witnesses, to appoint some other proper person to be a trustee in the place of such of them the said trustees parties hereto as shall so relinquish, or be discharged from, or die during the continuance of the said trusts; and so from time to time as often as any trustee shall happen to die, or relinquish, or be discharged as aforesaid, during the continuance of the said trusts, such appointment of a new trustee in the place of him so dying or being discharged, shall in manner as aforesaid from time to time be made. And it is hereby declared and agreed, by and between all the said parties hereto, that immediately after every such appointment of a new trustee shall be made, all such transfers, acts, deeds, matters and things whatsoever, shall be executed, made, done, and performed by the *surviving or other trustees* or trustee remaining in the trust, and by such other interested parties, as may be necessary or requisite in that behalf for conveying, assigning, transferring, making over, and vesting the trust, stocks, monies, and other the trust premises, so and in such manner,

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and by such ways and means as that the same may be fully, equally, and effectually vested in such new trustee or new trustees jointly or together with the surviving or other remaining trustees or trustee, upon the same trusts, and to and for the same ends, intents, and purposes, and under and subject to the same powers, provisoes, declarations, and agreements, as are hereinbefore mentioned, expressed, provided, and declared, of and concerning the said trust, capital sum, or stocks, so now vested in them the said trustees parties hereto, and other the trust premises respectively as aforesaid, or as near thereunto as the deaths of parties or other circumstances will then admit of. And that they the said several trustees and every of them, and their respective heirs, executors, administrators, and assigns, shall and may, by and out of the monies which shall come to their respective hands by virtue of the trusts aforesaid, retain to and reimburse himself and themselves respectively; and also shall and may out of such monies, pay and allow to his and their co-trustee and co-trustees, all such costs, charges, damages, and expences which they or any of them shall or may respectively bear, pay, sustain, or be put unto, in or about the execution of the trusts hereby in them reposed."

The marriage between the said *Osmond Beauvoir* and *Mary Sharpe* was soon afterwards solemnized. The said *Joshua Sharpe* died before the date of the next mentioned indenture, and the said *Sir W. Lynch* died in the year 1784.

By indentures of lease and release and appointment bearing date respectively the 17th and 18th days of *September* 1788, the release and appointment between

the said *Sir Charles Gould* and *Thomas Edwards Freeman* of the first part, the said *Rev. Osmond Beauvoir* and *Mary* his wife of the second part, and *John Bacon* of the third part, the said *Sir Charles Gould* and *Thomas Edwards Freeman* did (in consideration of 4040*l.* to them paid by the said *John Bacon*, at the request and by the direction and with the consent and approbation of the said *Osmond Beauvoir* and *Mary* his wife, and in execution of the power for that purpose contained in the said indenture of release, and of all and every other power in them vested,) bargain, sell, alien, release, and confirm, and the said *Osmond Beauvoir* and *Mary* his wife did grant, sell, alien, release, ratify, and confirm the said premises unto and to the use of the said *John Bacon*, his heirs and assigns. The said indenture of release and appointment was executed by all the parties thereto, in the presence of, and attested by two credible witnesses, and the purchase money of 4040*l.* was paid into the hands of *Sir Charles Gould* and *Thomas Edwards Freeman*, who signed a receipt for the same. The question directed by the Vice Chancellor for the opinion of the Court was, whether the said indentures, of the 17th and 18th days of *September* 1788, were a valid execution of the said power of sale. This case was argued in *Easter* term last, by

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Preston, for the plaintiff. The question is, whether the execution of this power by the two surviving trustees is valid. Generally speaking, a power given to three cannot be executed by two; but in this instance the fair meaning of the parties as collected from the whole instrument is, that the power should be executed by the trustees for the time being: first, it never could be in-

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tended to confine the execution of the power to the trustees named in the deed; for a power is given to change the trustees. The new trustees are to have all the powers of the original trustees, and one of these powers is that of sale; and although in terms the original power of sale is reserved to the trustees *and their heirs*, still it is clear from the other parts of the deed, that it could not have been the intention of the parties that the respective heirs of the respective trustees should execute the power; for the new trustees appointed under the authority of the clause for changing trustees are to have the same powers as the old trustees: they therefore the new trustees, and not the heirs of the original trustees, are invested with the authority to execute the power of sale; and this is perfectly consistent with the other parts of the deed; for the money arising from the sale was to be intrusted to the surviving trustees for the time being; and hence it may fairly be collected to have been the intention of the parties that the surviving trustees for the time being were, till the appointment of new trustees, to act in execution of the power by virtue of which the sales were to be effected. Looking therefore to the whole context of the instrument, the sound construction of the power seems to be, that the execution thereof should be confined to the trustees for the time being.

Sugden, contra. The intention to be collected from the whole of the deed appears to be, that the power should not survive, but that the heirs of each trustee should succeed to him until displaced by a new trustee. At the time of executing the deed the parties clearly intended that not less than three should be intrusted with

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with the execution of the power. The great object in these instruments is to protect the interest of the remainder-man against the acts of the tenant for life. Now by the construction contended for, that object will be defeated; for supposing the trustee appointed by the husband to be the survivor, he might by the consent of the husband (after the death of the wife) execute the power of sale, and the interests of the remainder-man would probably be neglected. It is true that the money is directed to be paid to the trustees for the time being; but that might be because there would be great inconvenience in paying it to three persons. It is however expressly provided that three minds should concur in the execution of the power: and further it may be observed, that the money would, in the ordinary course of things, be trusted with the personal and not the real representatives. If any of the trustees died, their heirs were to stand in their places. The power to appoint new trustees is not imperative on the parties, and therefore until new trustees were appointed, the heirs of the deceased trustees were to act, in order that there might always be at least three trustees. The heirs might be infants or lunatics, therefore a power of substitution was given, but still the same number would always continue; and that removes all argument drawn ab inconvenienti. It may be said, that the covenant for quiet enjoyment speaks of the trustees for the time being; but whether by that is meant the surviving trustees, must be collected from the other parts of the instrument. Where it is intended that the surviving trustees should act, they are expressly named as such; as for instance, each and every of them are to reimburse themselves their expenses. By the construction contended for, the intention of the parties will be defeated, and the inter-

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rests of the remainder-man will no longer be protected against those of the tenant for life; and the power would be executed by one, whereas it is clearly intended that it should be executed by not less than three. It is a clear proposition of law, that a power given to several persons by name cannot be executed by survivors. *Dyer*, 177. pl. 32. 210. pl. 24. *Peyton v. Bury* (a), *Moore*, 61. pl. 172. And in *Mansell v. Mansell*, *Wilmot's* note, the point now before the Court was treated as clear.

Preston, in reply. The authorities are not uniform as to powers surviving. In *Dyer*, 371. there is this case: "A. appointed two executors, and devised to B. all his land except a manor, which he appointed to pay his debts; one executor died: it was holden that the other might sell." The sound construction of this instrument must be collected from the whole contents. Now the power to change the trustees, in case any of them shall happen to die, affords internal evidence that the parties contemplated the possibility of surviving trustees, and that they, as the trustees for the time being, would be the persons to execute the power.

Cur. adv. vult.

The following certificate was afterwards sent to the Court of Chancery.

We have heard this case argued by counsel, and have considered it, and are of opinion that the said indentures, of the 17th and 18th days of September 1788, were not a valid execution of the said power of sale.

ELLENBOROUGH.

J. BAYLEY.

C. ABBOTT.

G. S. HOLROYD.

(a) 2 P. Wms. 626.

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DOE, on the Demise of GASKELL, *against* SPRY.Saturday,
May 22d.

EJECTMENT for a house and other premises situate at No. 189 *Tottenham Court Road* on the ground of a breach of covenant by the defendant. The premises in question were demised on the 6th *September* 1813 by the lessor of the plaintiff to *Samuel Bickford*, who assigned them to one *George Sellers*, and by whom they were assigned to the defendant. The lease to *Bickford* contained the following covenant: "That the said *Samuel Bickford*, his executors, administrators, or assigns, shall not nor will permit or suffer any person or persons to inhabit or dwell in, use, or occupy the said demised premises or any part thereof, who shall use or exercise therein or thereupon the trades or businesses hereinafter mentioned; that is to say, the trade or business of a brewer, baker, vintner, victualler, *butcher*, poulterer, fishmonger, fruiterer, herb seller, bagnio keeper, coffee-house keeper, distiller, dyer, brazier, smith, farrier, pipe burner, melting tallow-chandler, work hatter, or who shall make auctions or public sales of household goods or other things in or upon the said demised premises or any part thereof, without the consent in writing of the said *William Gaskell*, his executors, administrators or assigns, first obtained for that purpose; the said trades or businesses being particularly excepted in the ground-lease of the said demised premises; and it being the intention of the parties hereto, that the said *Samuel Bickford*, his executors, administrators, and assigns, shall be bound by all the covenants and agreements mentioned in the said indenture of lease." There

A covenant in a lease, that the lessee shall not exercise the trade of a butcher upon the premises, is broken by there selling raw meat by retail although no beasts were there slaughtered.

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was the usual powers for re-entry on non-payment of rent, or non-performance of all or any of the covenants in the said indenture of lease mentioned. The facts of the case, as they appeared on the trial before *Bayley J.* at the *Middlesex* sittings after the last term, were these. The defendant was a carpenter and joiner, and had taken this house and fitted it up as a chandler's shop, in which various articles of provisions, &c. were sold. But he also was in the habit of selling meat in a raw state to all his customers. There was no exposure of it at the shop-window, but it was in the interior shop, visible, however, to those who passed by the house, if they chose to look in; he did not kill any animals there. The question at the trial on the part of the plaintiff was, that this was the carrying on the trade of a butcher, and so a breach of the covenant, for which the lessors of the plaintiff had a right to recover the possession of the premises. *Bayley J.* left it to the jury to say, whether this was not a carrying on of this trade, telling them that it was not necessary to have actual evidence of the killing of animals in the premises. It was sufficient if the defendant sold the flesh, to constitute him a butcher. The jury accordingly found a verdict for the plaintiff.

Topping moved for a new trial, contending, that the proviso in the lease against carrying on the trade of a butcher, was properly applicable only to a person who slaughtered cattle as well as sold the meat: for the slaughtering of the cattle was the inconvenience intended to be prohibited by the lessor: but the mere selling of meat, as in this case, could not be intended to be prevented. Suppose
this

this had occurred before the repeal of the statute of 5 *Eliz.*, could it have been contended that this man was liable to penalties for carrying on the trade of a butcher without having served an apprenticeship? or could he be liable to the penalties imposed on butchers who do not take proper care of the hides of animals killed? If not, then he cannot be considered as a butcher, and the verdict is wrong.

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LORD ELLENBOROUGH C. J. It is not necessary that a man should carry on every branch of a trade in these premises in order to come within the proviso of the lease. It will be quite sufficient if he partially carries it on there; and here he does exercise a material part of it, for he exposes the meat for sale, which has, either by him or his assistants, been slaughtered elsewhere. In the case of *Doe dem. Bish v. Keeling (a)*, where there was a similar proviso against carrying on the business of a school-master, it was never made a question to what extent or in what manner that business was carried on. The real object in all these cases, is to prevent the lowering of the tenement in the scale of houses, by the exercise whether wholly or partially of those trades which in the judgment of the lessor are likely to prevent tenants from afterwards taking the premises, and which by so doing may depreciate their value at a future period. I think therefore, that the direction of the learned judge was right.

ABBOTT J. There are in many markets butchers' shops where no animal ever is or can be slaughtered,

(a) 1 M. & S. 95.

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and yet without doubt the persons occupying them carry on the trade of butchers there.

HOLROYD J. concurred.

BAYLEY J. Suppose this man had been convicted for selling meat on the Lord's day, would it be a defence to him to say that he did not kill the animal? and yet the penalty is only imposed on butchers who shall sell meat on that day. The 24 H. 8. c. 3. enacts, that every person who shall sell, by himself and others, the carcases of beef, pork, &c. shall sell at a specified price, and by avoirdupois weight. Now when this act was suspended for a time, by 27 H. 8. c. 9., as to the provisions contained in it, the latter act uses the words all butchers and others selling flesh by retail. So that these acts appear to have used the term "butchers" and "person selling flesh by retail" as synonymous. The 33 H. 8. c. 11., by which the first mentioned of these two acts was repealed, is to the same effect.

Rule refused.

Saturday,
May 22d.

HARTLEY *against* HARRIMAN.

An averment in a declaration that defendant's dogs were accustomed to worry and bite sheep and

lambs, is not supported by proof that the dogs were of a ferocious and mischievous disposition, and that they had frequently attacked men.

Seemle, however, that an averment that the dogs were of a ferocious and mischievous disposition would be sufficient in an action brought for an injury to plaintiff's sheep, without alleging specifically that they were accustomed to bite and worry sheep.

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well knowing that the said dogs were used and accustomed to hunt, chase, bite, worry, and kill sheep and lambs; which dogs, on the said day and year, and on divers other days and times, did hunt, chase, bite, and worry divers sheep, great with lamb, and other sheep of the plaintiff, by means whereof divers of them died and became of no value, and the residue were greatly injured. There was a second count in the declaration, which charged the defendant with so negligently and improperly keeping the said dogs, that they, on the day and year aforesaid, and on divers other days, &c. chased and bit the plaintiff's sheep. Plea Not guilty.

At the trial, at the last *Cumberland* assizes, before *Wood B.*, it appeared that the sheep in question were of a peculiar breed, and that the plaintiff, being anxious about them, sent his gardener, on the day they arrived, with his compliments to the defendant, requesting him to take care of his dogs, as he was apprehensive of some danger arising from the dogs frequently going across the field where the sheep were. The defendant, in answer to this message, said, that he kept the dogs for the defence of his house, and that he would, if he pleased, keep fifty more. When the gardener delivered the message to the defendant, he also further told him that he had himself been attacked by the dogs at the plaintiff's own door. There was other evidence produced to shew that the dogs had upon other occasions attacked men; and in one instance, where a man was attacked by them, a voice was heard from some person on the defendant's premises calling them off. It was also proved that they had run after the sheep in one or two previous instances. But there was no proof that they had ever bitten or worried any sheep before the event

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event which gave rise to the action. *Topping*, at the trial, contended, that there was no evidence to support that allegation of the declaration, which was necessary, viz. that the dogs were accustomed to bite sheep, to the knowledge of the defendant. *Scarlett*, for the plaintiff, cited *Peake's Law of Evidence*, chap. 6. sect. 2., where it is said, that when it is proved that the animal had once done mischief of any kind, and that the owner, after knowledge thereof, permitted him to go at large; he will be answerable for all other damages done by him, though of a different kind from that which he had before committed. The learned Judge, upon this, overruled the objection, on the ground that there was evidence of the dogs having attacked different men, and particularly the plaintiff's gardener, and that this had been done to the knowledge of the defendant. The jury thereupon found a verdict for the plaintiff for the value of the sheep. *Topping* having in the last *Michaelmas* term obtained a rule nisi for a new trial in this case,

Scarlett and *Littledale* shewed cause. The defendant had in this case sufficient knowledge of the ferocious nature of these dogs to justify the jury in finding this verdict. For it is quite clear that he knew they had attacked the plaintiff's gardener, he having been most distinctly warned of it, and that at the very time when he was cautioned as to the sheep. There is evidence that these dogs had on previous occasions run after the sheep, which is some proof of a hostile intention on their part; and as to the fact relied on by the other side, of the total absence of proof that they had ever before worried any sheep, that would go the length of establishing

ing that a man, however, previously cautioned, could never be responsible for the first offence committed by his dogs. The request made by the plaintiff at the time the sheep came, was evidence for the jury to infer that these were dangerous dogs; and the defendant did not then deny that they were so, for he only said that they were for the defence of his house, and that he would keep fifty more if he pleased. Then there is the circumstance of the voice heard from the defendant's premises calling off the dogs. It is true there is no distinct proof whose voice that was; but if either that of defendant or his servants, and the jury might surely infer that fact, it fixes them with the knowledge of the ferocious character of these animals. In *Judge v. Cox* (a), there was no proof that the dog had ever actually bitten any individual before, and yet the plaintiff recovered on a declaration which alleged that the dog had been accustomed to bite mankind, and that the defendant there knew it. [Abbott J. I left it to the jury in that case to say, whether the expression proved to have been used by Mrs. Cox, cautioning a person not to go near the dog lest he should be bitten, was not evidence from whence they might infer that to her knowledge the dog had previously bitten some person.] And the jury, from the circumstances of this case, might make a similar inference. For the defendant, being cautioned, used language tantamount to say, that though he was aware of the danger he was careless as to consequences.

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Topping and *I. Williams*, *contra*, were stopped by the Court.

(a) 1 *Starkie*, 185.

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LORD ELLENBOROUGH C. J. The plaintiff has I fear in this case tied up his complaint by the allegation of the particular habits of these dogs, and of the defendant's knowledge of those habits. For unless it be inferred that a dog accustomed to attack men is ipso facto accustomed also to attack sheep, there is no evidence to support this declaration. He might perhaps have stated his ground of action more generally by alleging that these dogs were of a ferocious nature and unsafe to be left at large; and there is evidence sufficient to shew that the knowledge which the defendant had of these dogs ought to have imposed on him the duty of tying them up. But here the plaintiff has stated a particular habit, and it does not appear clearly either that the dogs had that habit, or that if they had the defendant knew it. There must therefore be a new trial.

BAYLEY J. The declaration might have been framed more generally, and might have stated that these were dogs of a ferocious and mischievous description, and then there might have been evidence to support it. But here it is stated that they were accustomed to bite sheep and lambs. And there is no evidence of that fact.

ABBOTT J. I am of the same opinion. It is not necessary to decide now whether a declaration in a different form might not have been sufficient, and might not have been sustained by the present evidence. For it is clear that in its present form one material allegation has not been proved.

HOLROYD J. If the allegation as to the habit of these dogs were struck out of the declaration, a sufficient cause
of

of action would not remain. Then it follows, that it is material, and absolutely necessary to be proved. And it will not do to prove another fact, which, if inserted in the declaration instead of this, might have been quite sufficient to support the action. For the allegation itself must be proved.

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Rule absolute.

LEIGH and Wife *against* THORNTON.

Tuesday,
May 26th.

ASSUMPSIT. Declaration stated, that by an agreement made between the plaintiffs and *Henry Bewicke*, of the 20th *March* 1800, they agreed to execute a lease of certain premises therein specified to the said *Henry Bewicke* for the term of fifty years, at a specified rent. That under this agreement *Henry Bewicke* entered, and that in *September* 1803, all his interest in the premises vested in the defendant, who then entered and became possessed of the term. And they alleged, as a breach of the agreement, that the defendant did not keep the premises in tenantable repair. There were also other counts for the use and occupation of the premises. Plea, *actio non accrevit infra sex annos*, and issue thereon. At the trial before *Park J.* at the last summer assizes for the county of *Hereford*, it appeared that there was an agreement between the plaintiffs and *Henry Bewicke*, whereby they agreed to grant to him a lease of the premises for fifty years at a certain specified rent. No lease was however in fact executed; but *Henry Bewicke* entered and continued in possession till his death on 4th *July* 1801. Having died intestate, his father *Calverley Bewicke* took out administration, en-

The statute of limitations is a good defence to an action by a landlord for rent against one who had once been his tenant from year to year, but who had not, within the last six years, occupied the premises, paid rent, or done any act from which a tenancy could be inferred, although the tenancy had not been determined by a notice to quit.

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against
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tered upon the premises, paid rent, and continued in possession until he also died in *September 1803*. He appointed the defendant his executor, who also entered and paid rent until 1806. At that period a person of the name of *Raby* took possession; but no assignment of the premises from the defendant to *Raby* was produced. *Raby* continued in possession, and paid rent till 1808; the plaintiffs however expressly refused to accept him as their tenant, and gave receipts for rent in the name of *Thornton*. Subsequent to *April 1808* there was not any proof of an actual possession of the premises, or of any payment or demand of rent by any one. Upon these facts the learned Judge was of opinion that there was no proof of the defendant's being tenant within the last six years, and directed a nonsuit. A rule having been obtained in last *Michaelmas* term to set aside this nonsuit,

Jervis and *Puller* were now to have shewn cause against it, but the Court called upon

W. E. Taunton and *Campbell* in support of the rule. The statute of limitations is no bar to the plaintiffs recovering the rent that has accrued due within the last six years. When an executor enters upon premises devolving upon him in that character, he takes the same interest in the land which the testator had. *Doe v. Porter.* (a) Here it is in proof that the relation of landlord and tenant once subsisted between the plaintiffs and defendant; and that relation could only be determined by a notice to quit, of which there was no

(a) 3 T. R. 13.

evidence. The tenancy therefore not being legally determined still continues, and the defendant is liable in this action. The mere circumstance of the non-payment of rent cannot of itself operate as a determination of the tenancy: nor will the non-occupation of the premises have that effect, or discharge the tenant from the payment of rent: for it has been holden, that where the premises during the term are destroyed by fire, and thereby become incapable of occupation, that the tenant is still liable for the rent, and that it is recoverable in such an action as the present. *Baker v. Holtzaffell*. (a) The tenant in that case had not the actual but only constructive occupation. Here the tenancy not being determined, the landlord could not enter without being a trespasser; for the right of possession was in the defendant, and he had a constructive although not an actual occupation. In this case therefore the defendant has in law holden the premises for the last six years, and the plaintiffs in this form of action are entitled to recover the rent that has accrued due during that period.

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LORD ELLENBOROUGH C. J. This case does not appear to me to involve a question of any great difficulty. There certainly is not any authority precisely in point. The defendant being executor to a tenant from year to year, enters upon the premises, and pays the rent for some time; but during the last six years he has neither occupied nor paid rent, nor done any act from which a tenancy can be inferred: then no cause of action has accrued to the plaintiffs in respect of these

(a) 4 Tantt. 46.

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premises during that period. And besides, the case is equally strong upon the evidence to charge *Raby* as the tenant of these premises, as it is against the present defendant. Perhaps upon this evidence I should have left the case to the jury, with a very strong direction to find for the defendant: but I cannot say that the learned Judge was wrong in nonsuiting the plaintiffs, when there was not only no occupation of the premises within six years, but a total absence of any circumstance from which the relation of landlord and tenant during that period can be fairly inferred. I therefore think that this rule should be discharged.

BAYLEY J. I am of the same opinion. If the interest in these premises devolved upon the defendant as executor, and he had been sued in that character, he would only be liable out of assets. If he is charged as assignee, the answer is, that he is liable in that character only in respect of his privity of estate, and that his obligation has ceased by his getting *Raby* to accept the premises, whereby the latter became liable in that character. If he is charged as tenant, then the answer is, that during the last six years he never occupied the premises, or did any act to make himself liable as tenant: and consequently, that the plaintiffs' cause of action did not accrue within that time.

ABBOTT J. I am of the same opinion. The only evidence to affect the defendant was, that the relation of landlord and tenant once subsisted between these parties: but it is necessary for the plaintiffs to shew a subsisting cause of action in respect of such relation within the last six years, which they have failed to do. It has

been

been argued, that the defendant must be taken to have continued tenant until the tenancy was determined by a notice to quit, and that therefore he is tenant at the present time, and that the plaintiffs are entitled to recover rent for the last six years. If this argument were to prevail, and the premises had continued in the same situation unoccupied for forty or any number of years, the defendant would always be liable for the last six years' rent, which would certainly be productive of great inconvenience.

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HOLROYD J. The defendant can only be charged as assignee in respect of his privity of estate. When *Calverley Bewicke* entered and occupied, he became liable in that character. When the defendant took to the premises, he became assignee by some title or other. *Raby* also claimed to be tenant, and paid rent; and the same evidence by which the defendant is said to be liable as assignee, will also affect *Raby*. The defendant therefore is not liable as assignee within the last six years. Then is he liable as tenant? Did he hold the premises during that period? In point of fact he certainly did not: but it is said that he had a constructive occupation; or, in other words, that it is to be inferred from the circumstance of his having been tenant at a former period that he was so during the last six years. But it seems to me that the subsequent occupation by *Raby*, and the non-occupation by the defendant, raises the opposite inference; there being the same evidence of *Raby's* being tenant at one time as of the defendant's being so at another: and there is no proof that the defendant ever became tenant subsequent to the occupation of the premises by *Raby*. I think, therefore, that

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there was here neither an actual nor constructive occupation by defendant within the last six years, and that this rule must be discharged.

Rule discharged.

Wednesday,
May 27th.

The KING *against* The Justices of LANCASHIRE.

An inclosure act gave to the party aggrieved a right of appeal for any thing done in pursuance of that act, or of the recited (general inclosure) act, on giving to the commissioner and to the parties concerned ten

days' notice in writing. Notice of appeal against an order ascertaining the boundaries between two townships, was served on the commissioner, but not on the lady of the manor, who was a party materially concerned in the question :

Held, that the notice was insufficient: although the general inclosure act authorized the commissioner to ascertain the boundaries between the several parishes, and gave a right of appeal, on giving notice to the commissioner only.

TOPPING had obtained a rule nisi for a mandamus to the Justices of *Lancashire*, to cause continuances to be entered upon the appeal of the Hon. and Rev. *John Lumley Savile*, against an order or adjudication made by *Thomas Gee*, the commissioner under a local inclosure act for the township of *Trawden* in the county palatine of *Lancaster*, ascertaining the boundary between that township and the neighbouring parishes, manors, &c.

The appeal was made to the court of quarter sessions, on the ground that the commissioner had included within the boundary of *Trawden*, a considerable part of the adjoining manor belonging to Mr. *Savile*.

When the case came on at the sessions, the counsel of Mr. *Savile* proposed to respite the hearing of the appeal, which had been entered, till the next sessions.

But the counsel on the other side objected that the notices of appeal were wholly insufficient, and that the sessions had no jurisdiction in the matter in consequence of that insufficiency. It appeared that a sufficient notice had been given to the commissioner Mr. *Gee*; but no notice whatever had been given either to the Duchess of *Buccleuch*, the lady of the

manor

manor of *Trawden*, or to her agent: and it was contended that the clause of appeal in the local inclosure act, which required that ten days' notice in writing should be given to the commissioner, *and to the party or parties concerned*, not having been complied with, the appeal could not be entered or heard. The court of quarter sessions were of this opinion, and ordered the appeal to be struck out of the paper.

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Scarlett and *Starkie* now shewed cause. The objection taken at the sessions to the hearing of this appeal, arises on the appeal clause contained in the local inclosure act. That clause states, "that if any person or persons shall think himself, herself, or themselves aggrieved by any thing done in pursuance of the said recited act, or this act (other than and except such determinations of the said commissioners as are herein or by the said recited act directed to be final, binding, and conclusive, and except in such cases as are hereby authorized to be tried, settled, or determined by an action at law hereinbefore mentioned,) then and in every such case he, she, or they may appeal to the general quarter sessions of the peace which shall be holden for the county of *Lancaster* within four months next after the cause of complaint shall have arisen, on giving to the said commissioner, and to the party or parties concerned, *ten days' notice in writing* of such appeal, and of the matter thereof." Now here it is admitted, that due notice in writing has been given to the commissioner, but none to the Duchess of *Buc- cleuch*, the lady of the manor. Then the only question remaining is this,—Was the lady of the manor a party concerned in this appeal? That can hardly be doubted,

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when it is considered, that the question in the appeal is, whether her manor has been improperly increased or not, by the act of the commissioner. Her interest is therefore direct and immediate in supporting this determination. And it cannot be said that her appearance at the sessions by her counsel has cured the objection of the want of notice. For the statute specifically requires ten days' notice, and that in writing, to be given. That preliminary requisite not having been complied with, the sessions have done right in refusing to hear the appeal.

Topping and *I. Williams*, in support of the rule. The question is of the utmost importance to the party. For if this mandamus do not go, this gentleman will lose a considerable property without having had the opportunity of being heard upon his claim in consequence of this which is a mere formal objection. There are two acts upon which the decision will turn, the one the 41 G. 3. c. 109. (the general inclosure act), the other the local act, which has been already referred to. It is the former act alone which gives the commissioner the power of ascertaining the boundaries of the district to be inclosed, with those of the neighbouring parishes, manors, &c. and in this clause an appeal is given to the parties aggrieved on their giving eight days' notice in writing to the commissioner. Now it is under this clause that this appeal is made. The local act contains no direction as to ascertaining the boundaries. And though undoubtedly the words of that appeal clause are strong, and as it is said must be construed to apply to "any thing done in pursuance of the said recited act" (the general inclosure act) "or that act," yet the
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more reasonable construction of this will be to apply this clause of appeal to those cases which are either wholly provided for by the local act or those which are provided for by the general inclosure act, and in which no appeal was thereby given, and that will include several cases of importance. Unless this construction be adopted it will produce great inconvenience; for the Duchess of *Buccleuch* is not the only party concerned; all the commoners of *Trawden* are so also. For their right of common becomes more or less valuable as the common itself is greater or less in quantity. Yet to say that it shall be necessary to give ten days' notice in writing to each of these would be altogether to deprive the party of his appeal. The appeal therefore must be regulated alone by the clause in the general inclosure act, and a notice to the commissioner will be sufficient. And there is no hardship or injustice in this; for he being elected by the persons interested in the inclosure, is as it were the representative of their rights, and a notice to him may be considered as virtually a notice to them all. There is another way of considering this question. Suppose the two acts referred to consolidated in one act, which by a clause at the end of the general inclosure act is directed to be done in construing them; then there would be an act containing first a clause for ascertaining the boundary, with an appeal clause requiring eight days' notice to the commissioner, then several other provisions respecting the inclosure, and lastly the appeal clause in the local act. If the act stood so, it would be obvious that this last clause had no reference to the question of boundary: and then it would follow, that the notice here given was quite sufficient, and that the sessions ought to have entertained this appeal.

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LORD ELLENBOROUGH C. J. I do not know that in this case, the party has any other remedy than that which he is now seeking from the Court, and his case is therefore entitled on this account, as well as on account of the importance of the interest at stake, to receive the deliberate consideration of the Court. But after the very laborious and ingenious comment which has been made on these two acts of parliament, I still think that the party in this case is not entitled to have his appeal heard. The general inclosure act (a), must be taken into the consideration of the Court conjunctively with the local act. Now the clause in this latter act of parliament respecting the right of appeal, states, "that if any person or persons shall think himself or themselves aggrieved by any thing done in pursuance of the said recited act, or this act, (other than is therein excepted,) then and in every such case he, she, or they may appeal to the general quarter sessions of the peace on giving to the commissioner, and to the party or parties concerned, ten days' notice in writing of such appeal and the matter thereof." The ascertainment of the boundaries in this case is undoubtedly a thing done under the authority of the said recited act, and is therefore a thing against which this power of appeal is given. If so, there must be ten days' notice in writing given to the commissioner, and to the parties concerned: here the Duchess of *Buccleugh* is a party concerned; she, as lady of the manor, has an immediate and important interest in the ascertainment of the boundary, and is therefore most emphatically a party concerned. Then she must be entitled to notice, the act of parliament having expressly directed it to be given

(a) 41 G. 3. c. 109.

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to her. For this act requires notice to be given where the former act did not, and has supplied the defect which previously existed; for under the general inclosure act, if the commissioner, to whom alone the notice is directed to be given, should happen to be negligent of his duty, a party interested might be grievously injured. This act therefore, requires a specific notice to be given to him. In this case none has been given; nor can any sufficient cause in sense and reason be assigned, why it should not have been given. It is said, indeed, that if this construction be adopted, it would follow that all the commoners would be entitled to notice, and so there would be endless trouble to the party appealing, who could never ascertain who were or who were not parties concerned. Now whatever might be the inconvenience in other cases, there is none here; for the Duchess of *Buccleuch* is most unequivocally a party concerned. As to the other question, whether commoners, before any allotment made, are to be considered under this act as parties concerned, it is more doubtful. I should think they were not. Giving effect therefore to the cumulative construction of the two acts, as we are required to do by the clause in the general inclosure act, I think that the Duchess of *Buccleuch* is entitled to the benefit of notice, and that the party, not having given one to her, had no right to have his appeal heard at the quarter sessions. The rule for a mandamus must therefore be discharged.

BAYLEY J. I should be glad if I could entertain any material ground of doubt upon this question; for it is undoubtedly a great hardship on the party by this omission to be deprived of the right of having his
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appeal heard and determined. The general inclosure act gave to the commissioners the power of fixing the boundaries of the parishes, and the districts to be inclosed; against which determination no appeal was given, except on compliance with the requisites imposed either by that act or the local act. By the general act an appeal is allowed to the parties aggrieved, on their giving eight days' notice to the commissioners; and at the conclusion of that act there is a clause which enacts, "that the powers, authorities, and directions in that act shall only be so far effective and binding in each particular case as they, or any of them, shall not be otherwise provided and enacted in the local act." But in this case the local act does provide otherwise: for the party who appeals is required to give ten days' notice in writing to the commissioner and to the party concerned; and it would be a great hardship if the party concerned were bound by a notice to the commissioner alone. For although, in a case where the commissioner included within the boundary more than properly was claimed by the district, a notice to him from the proprietors of the neighbouring districts, who might be dissatisfied, would in all probability find its way to the parties concerned, who had nominated him commissioner; yet, if the reverse were the case, and the parties nominating were dissatisfied with the boundary, it is by no means probable that a notice to him would be transmitted to the neighbouring proprietors, who would in such case be concluded without having had the opportunity of litigating the appeal. The local act, therefore, has by this clause very wisely provided, that a notice should also be given to the parties concerned. It is said that the clause should be

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be construed to apply to cases under the local act, and to those where no appeal is given by the general inclosure act, but not to include the case of boundary for which an appeal is given by that act. But this construction would be to introduce words into the clause which are not to be found there, and cannot, for that reason, be adopted. It is said also, that if notice to the parties concerned be required, it must be given to all the commoners; but that is not so; for the party concerned meant by the act of parliament is the person directly interested in the soil, who, by the boundary being either in one direction or the other, would be entitled to more or less land; that person in this case is the Duchess of *Buttleuch*, who is therefore entitled to notice. But the interest of the commoners is too remote an interest, and is not comprehended within the meaning of the clause. We are, therefore, bound by the express words of the act of parliament, and it is not in our power to grant a mandamus in this case.

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ABBOTT J. It is not to be assumed in this case that the decision of the commissioner is wrong; for the presumption is that his determination was right. It is, indeed, to be lamented, that the party, by his own neglect, should have lost the opportunity of trying the question. The Court must, however, decide upon the correct construction of this act of parliament. It is true that affirmative words in a statute do not repeal other affirmative words contained in a prior act, unless they be repugnant. But that rule only applies to acts unconnected with each other; and in this case the two acts of parliament are closely connected. Neither can it be said that these two acts can be taken as one act with

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two clauses of appeal; they are indeed incorporated, but it is subject to the restriction, that the clauses in the general inclosure act are not otherwise provided for or altered in the local act. Now the general inclosure act contains a provision for giving notice of appeal, and the local act contains one also, which is different. Then, according to the true construction of the two acts, the provision in the general inclosure act ceases, and that in the local act has its full operation. The general act lies dormant and inoperative until the local act calls its powers into action. And the commissioner is appointed to carry the purposes of the local act into effect, with such of the powers and authorities, and subject to such of the directions, regulations, and provisions contained in the general inclosure act as are not repugnant to, controuled by, or otherwise provided for, by any of its clauses or provisions. It appears then that the commissioner has the power to ascertain the boundary, subject to the appeal provided for by the local act; and so ten days' notice in writing both to the commissioner and to the party concerned must be given. And notwithstanding the difficulties suggested, I think the provision reasonable; for if it did not exist, the inconvenience mentioned by my Brother *Bayley* would be likely to occur. I agree also with him as to the other point. The words "party concerned" mean in this case the owner of the soil: for it is the owner of the soil who is mainly interested in a question of boundary, and the interest of the commoners, which is more remote, does not, as it seems to me, entitle them to any notice. Sufficient notice therefore not having been given in this case, I think the sessions did right in refusing to hear this appeal.

HOLROYD J. I am of the same opinion, that the notice in this case was not sufficient. The words of the appeal clause in the local act are sufficient to cover every case in which a party might be aggrieved by any thing done by the commissioner, either under it or the general inclosure act; and these words are not to be restrained, unless it clearly appears to have been the intention of the legislature that they should be so. The two acts are not to be incorporated generally, but only so far as the provisions of the general act, are not altered by the local act. In the general act, the right of appeal is given in two cases, in that of boundary, and in that of stopping up roads, and a particular notice of appeal is required. But in the local act, a general right of appeal is given, with a different notice. The case, therefore, must be considered as if the two acts were read together, but with the clause of appeal in the general act expunged, and then no doubt would remain. The difficulty as to giving notice to all the commoners does not appear to me to exist. For this is a question of boundary, not of a right of common, and the "parties concerned" meant by the clause must be those only who are directly, and not those who are only incidentally, interested in the soil. It would, therefore, have been quite sufficient to have given a notice to the lady of the manor alone. But no such notice having been given, the rule for this mandamus must be discharged.

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Rule discharged.

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Thursday,
May 28th.

The KING *against* The Justices of SUFFOLK.

By a local act the management of the poor of a town was vested in certain persons, who were empowered to make rates, and an appeal was given to the party aggrieved to the town sessions against every such rate; and a further appeal, if required, to the county sessions. An appeal against four rates being entered at the January town sessions, four grounds of appeal were specified in the notice; the party being dissatisfied made a further appeal to the county sessions, and two other grounds of appeal were added; the fourth being that the party was rated in respect of his lands in a higher proportion than all the other inhabitants mentioned in the rate: Held, first, that one appeal against the four rates was sufficient; secondly, that it was not necessary to give notice of appeal to all the inhabitants named in the rate; and, thirdly, that the appellant must, at the county sessions, be confined to the original grounds of appeal at the town sessions.

STORKS had obtained a rule for a mandamus to the Justices of *Suffolk*, to cause continuances to be entered upon the appeal of *William Strutt, Esq.* against four rates, dated respectively, 21st *September* 1817, 19th *October* 1817, 16th *November* 1817, and 14th *December* 1817, for the relief of the poor of the town of *Sudbury*, and also against an order made at the general quarter sessions of the peace held in and for the said town of *Sudbury* and the liberties thereof, on the 16th *January* 1818, confirming the above rates. By a local act passed in the reign of *Queen Anne*, the management and relief of the poor of the borough of *Sudbury* were vested in certain persons, who for that purpose were made by the act a corporation, and who were empowered to make rates and assessments; and an appeal was given against any such rate or assessment, to the party aggrieved by it, first, to the justices of the peace of the town of *Sudbury*, at their general quarter sessions of the peace next after the making and demanding the same, or at any other sessions to be held for the said town and liberty, who were thereby authorized to make such order therein as to them should seem just. And secondly, by the same act, a further appeal was given against the rate to such person or persons who should not think fit to abide by

such

such order, so made by the justices of the said town, to the justices of the peace for the county of *Suffolk*, at their next general quarter sessions of the peace, who were then authorized to make a final order therein. At the *January* sessions for the town of *Sudbury*, Mr. *Strutt* instituted his appeal against the four rates above mentioned; and he then stated in his notice four grounds of appeal. The borough sessions having determined against him, he appealed to the quarter sessions for the county of *Suffolk*; and on this occasion he inserted two additional grounds of appeal in his notice. When the case came on to be heard, it was objected that he had not given sufficient notices within the statute of 41 G. 3. c. 23. s. 6. For the fourth ground of appeal in his notice was, that he was rated and assessed for and in respect of his lands, tenements, &c. in a greater and higher proportion than all the other inhabitants and occupiers whose names were mentioned and inserted in the said rates. This therefore, made it necessary to give notice to those persons, they being interested in the appeal. The court of quarter sessions were of this opinion, and refused to hear the case further. It appeared from the affidavits that sufficient notice had been given to the persons who had made the rates in question under the authority of the local act; and that the number of the other persons mentioned in the rate amounted to about three hundred and sixty-four individuals.

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Nolan and *Dover* shewed cause. The objection to the notice taken at the sessions is good. For by that notice the party institutes a comparison between his own rate and those of all the other persons. And the rule

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as to that is, that where a party institutes a comparison he must give notice to the person with whose rate he compares his own. The inconvenience, if any, is superinduced by the party's own act; for he might have specified particular individuals and given notices to them only, which is the usual mode of proceeding. But from the affidavits before the Court, it appears that there are other objections. And though they were not taken at the sessions, yet the Court will not send this case again there, if it appears that when heard it must meet with the same fate as before. This is one appeal against four separate rates. That will not do: for a party may have different grounds for supporting each rate. With respect to some, (as is the case with one rate here,) the party appealing may be out of time. He ought, therefore, to have instituted separate appeals against each rate. And this goes to the whole cause of appeal. But if that be not so, the Court will only make part of this rule absolute. For with respect to the first rate mentioned in the notices of appeal, the appellant was clearly out of time. That rate was dated 21st September, and the appeal ought therefore to have been made to the October sessions. Then the notice of appeal to the county sessions contains two additional grounds of appeal: but that court is only in the nature of a court of review, and therefore the party is confined to the same ground of appeal which he took at the borough sessions. If then the rule be made absolute at all, it can only be for a mandamus to the justices to hear the appeal against the three last rates on the four grounds of appeal contained in the original notice to the borough sessions.

Storks

Storks and Robinson, contra. The appeal clause states, that the party aggrieved by any rate may appeal "to the justices of the peace of the town of *Sudbury*, at their general quarter sessions of the peace next after the making or demanding the same, or at any other sessions to be held for the said town and liberty." Now though unquestionably the first rate was before the *October* sessions, yet the party was not compelled to go there, for he may go to any other sessions of the peace holden for the said borough, and therefore he might go to the *January* sessions. [*Bayley J.* The true construction of that clause is this: the legislature alluded to the general sessions, which might be holden within the borough, and which might happen before the quarter sessions, not depending on that act of parliament by which the latter are regulated; and the clause means, that the party may appeal either to the quarter sessions, or to the general sessions, next after the rate, as the case may be. I think the appeal as to the first rate was clearly out of time.] Supposing that to be so, still the party is entitled to have his appeal heard against the remaining rates. The objection as to including four rates in one appeal is not valid; for it may be considered in fact as four separate appeals: and the sessions might confirm one rate and quash the others, according to their discretion; so that the respondents would not suffer any inconvenience. Then, as to the objection to the notice, it is manifestly next to an impossible thing to give the notices required by the objection: and here the party does not seek to increase the rates of any other person, but only to diminish his own; and that is the true ground of distinction between the cases where notice to the other individuals is or is

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not required. The last objection is, that here the appellant can only appeal to the county sessions on the grounds taken by him at the borough sessions. But this is not well founded: for the further appeal given is not against the order of the borough sessions, but against the rate, if a party shall be dissatisfied with that order; all objections to the rate may therefore be taken. Where an appeal against a conviction or against an order of magistrates is given, the party appealing is never confined to the same objections which he took before the magistrates, but is always at liberty to enter into the whole case.

BAYLEY J. (a) The first objection made in this case is, that the party has entered one appeal against four distinct rates, which, as it is contended, it was not competent for him to do. Now the act which gives the appeal states, that a party who may find himself unequally taxed or assessed, may appeal against any such rate or assessment. It does not say that he must appeal against that rate *per se* without joining it with the others, which, being monthly, may have been made in the interval between one sessions and the next. The joint appeal may then be considered as a separate appeal against each rate; and if the sessions should be of opinion that injustice would be done by hearing the appeal against the four rates jointly, they might determine upon them separately; but they are not bound to do so. The party therefore may legally appeal against these four rates in the manner adopted by him in the present case. Then it is suggested, that the notice is

(a) Lord Ellenborough C. J. was absent.

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objectionable. It contains six grounds of appeal, the fourth of which is "that the appellant is rated for his premises in a greater and higher proportion than all the other inhabitants and occupiers whose names are mentioned in the said rate." It is contended that this made it necessary to give notice to all those other inhabitants and occupiers, amounting in the whole to the number of three hundred and sixty-four persons. But that is not necessary. The statute 43 G. 3. c. 23. first gave to the justices the power of amending the rate appealed against, instead of altogether quashing it; but required the grounds of the appeal to be stated, and notice to be given to the parties affected by the appeal. So that where the ground is that *A.*, *B.*, or *C.* are under-rated, it would be necessary to give notice to those individuals: but where the ground of complaint is, that the party appealing is over-rated in respect to all the rest, then it would not be necessary, because the alteration sought is the diminution of his assessment only, and the rest of the rate remains entire. Then as to the other point, that the party here has inserted in his second notice two fresh grounds of appeal, the impression on my mind is, that he must at the county sessions be confined to the same grounds of objection to the rate as he took at the borough sessions: for the former court is in the nature of a court of review, and it is their duty to examine if the rate can be supported on the grounds decided upon by the Court below. If that were not so, it would be open to the party at the borough sessions to state any illusory grounds of appeal, and to put forth his whole strength by surprize at the county sessions. The clause therefore which directs that the party, if dissatisfied with the decision of the

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borough magistrates on his case, *may have his further appeal* to the justices of the county of *Suffolk*, must, by fair construction of law, be taken to give a further appeal, but only on the same grounds as were taken by the borough magistrates. This objection, however, only goes to a part of the notice; and as the justices have wrongly decided in refusing altogether to hear the appeal, the rule for the mandamus must be made absolute.

ABBOTT J. I entirely agree in what has fallen from my Brother *Bayley* on the two first points, and I think also that the party can only enter into the same grounds of appeal at the county sessions which he took at the borough sessions. The rule therefore should be amended, and made absolute for a mandamus to the justices to hear the appeal against the three rates on the first, second, fifth, and sixth grounds of appeal.

HOLROYD J. I am of the same opinion. The county sessions are to re-try the same matters which were triable at the borough sessions. In all cases of new trials or of error the court of appeal looks only at the original proceedings. There may however be fresh evidence adduced. The notice of appeal is in the nature of a declaration, and must be the same on both occasions. Then the appeal to the county sessions must here be confined to the original matter of complaint only.

Rule absolute for a mandamus to hear the appeal on the first, second, fifth, and sixth grounds.

Brunswick v. Robinson 9. ad. 1818.

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MORGANS against BRIDGES and Another.*Saturday,
May 30th.*

ACTION against the defendants, late sheriff of the county of *Middlesex*, for permitting to escape one *Godfrey Barnett* whom he had arrested on mesne process at the suit of the plaintiff. Plea, Not guilty. At the trial before *Abbott J.*, at the *London* sittings after *Hilary* term, it appeared in evidence, that a writ having issued against *Godfrey Barnett*, at the suit of the plaintiff, the latter sent one *Davis* to point out the person of the defendant to the sheriffs' officer. The sheriffs, by their officer, arrested the person so pointed out: upon enquiry however, he turned out to be *Maurice Barnett*, a brother of *Godfrey Barnett*. The former was the person intended to be arrested; he had really contracted the debt, and had then described himself as *Godfrey*, and the officer was informed of these circumstances, and was desired to detain him in custody; but he refused to do so unless the plaintiff would give an indemnity, and that being refused, the person in custody was permitted to go at large. Upon these facts it was urged, that as *Maurice Barnett*, the real debtor, was once in the sheriff's custody, it was the duty of the latter to detain him, although the writ issued against *Godfrey Barnett*. The learned Judge directed the jury to find a verdict with nominal damages for the plaintiff, with liberty to the defendant to move to enter a nonsuit. A rule for that purpose having been obtained in *Easter* term,

The sheriff having a writ against *G. B.*, arrested *M. B.*, who was the real debtor, and at the time of contracting the debt had represented himself as *G. B.*: Held, that the sheriff, having been informed of these circumstances while he had the real debtor in his custody, was not bound to detain him, and therefore that an action would not lie against him for an escape.

Marryat and *Reader* now shewed cause. This action is clearly maintainable. The sheriff having in

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his custody *Maurice Barnett*, and having been informed that he had described himself by the name mentioned in the writ, suffers him to escape; and the plaintiff is thereby injured. The question is, whether the sheriff be not bound to arrest a person described in the writ by an assumed name. The assumed name was the only name by which he was known to the plaintiff, and as far as the purposes of this action are concerned, must be taken to be his real or reputed name; for if the debtor had been sued by that name, and pleaded in abatement, the fact of his having described himself by that name at the time of making the contract, would be sufficient evidence to support a replication, that he was known as well by one name as the other. The plaintiff therefore might sue him by that name; and if so, the sheriff would be justified in arresting the person so described by that assumed name in the writ; and his liability being co-extensive with his protection, he was bound to execute the process against a person whom he knew to be the real debtor, but who was described in the writ by an assumed name. The sheriff being therefore bound to arrest him, and having him once in his custody, was guilty of negligence in suffering him to escape.

Topping and D. F. Jones, contra. The declaration charges, that *Godfrey Barnett* was indebted to plaintiff; whereas in truth, *Maurice Barnett* was indebted: it is averred, that the sheriff took and arrested *Godfrey Barnett*; whereas he never arrested him, but *Maurice Barnett*. The evidence therefore does not support the declaration, and the plaintiff ought to have been nonsuited. It is argued however, that in this action

Maurice Barnett is *Godfrey Barnett*, and that the sheriff having been informed of the circumstances of the case, ought to have treated him as such, and was bound to execute the writ as against him. But *Shadgett v. Clipson* (a), is an authority to shew, that the sheriff, under such a writ, could not justify the arrest of a person not bearing the real or reputed name mentioned in the writ; and *Cole v. Hindson* (b), and *Scandover v. Warne* (c), are to the same effect. In *Foster* (d), it is laid down, that if there be a mistake in the name of a person on whom the process is to be executed, and the officer exceed his authority and be killed, this will amount to no more than manslaughter in the person whose liberty is invaded. Assuming, however, that the sheriff under the special circumstances of this case would have been justified in arresting *Maurice Barnett*, it by no means follows, that he was bound so to do; and it is incumbent on the plaintiff to establish that he has made himself a wrong-doer by a breach of duty. He is bound to arrest the person described in the writ. In ordinary cases he may acquire information as to the identity of parties described by a reputed name, from persons within his bailiwick, having no interest in the execution of the process; but as to the identity of a person described only by a name assumed for a particular purpose, he can acquire information only from the party in whose presence the name was assumed, and that would generally be a person interested in executing the process. Is the sheriff bound to trust to information coming from such a source? upon the truth or falsehood of which must

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(a) 8 East. 328.

(b) 6 T. R. 234.

(c) 2 Camp. 270.

(d) P. 312.

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entirely depend, whether he be guilty of a tort or not; or even in case of death ensuing from resistance, whether the offence would be murder or manslaughter. The sheriff might be presumed to know the reputed names of all the persons within his bailiwick; but it is certainly impossible that he should be cognizant of a name assumed by an individual for a particular purpose: and it seems unreasonable that his liability should depend upon a fact not only not within his knowledge, but upon which in most cases he cannot have the means of acquiring certain knowledge.

Lord ELLENBOROUGH C. J. Where a party has misrepresented himself, and taken a name which does not belong to him, it is not permitted to him to take advantage of his own wrongful act, so as to enable him to avoid the consequences of it: for a mistake induced by his own affirmation cannot give him a right of action. If, therefore, the sheriff had in this case detained *Maurice Barnett*, it appears to me that he might have justified it, in case that person had brought an action for the false imprisonment against him. I remember a case to this effect before Lord *Loughborough*, where a person had obtruded himself instead of another on the sheriff's officers, and afterwards, having been arrested, brought an action against them; and Lord *Loughborough* held that it would not lie. I dissented at that time from the decision; but, on fuller consideration, I have been satisfied that that case was rightly determined. But this case is different. The question here is not whether the sheriff, in case he had kept *Maurice Barnett* in custody, would have been justified in so doing; but, whether he was bound so to do: be-
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cause, if he was not so bound to act, he cannot be liable to the present action. And I think that he was not so bound to act. If we were to hold that he was, we should place him in a situation of great difficulty and peril. He could not tell whether to rely safely on the assertions of the one party or the other. Then if he was not bound to detain *Maurice Barnett* in his custody, the present action cannot be sustained; and the rule for entering a nonsuit must be made absolute.

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BAYLEY J. I am of the same opinion. The plaintiff in this case might certainly have proceeded against *Maurice* under the name of *Godfrey*; and if the sheriff had detained him in custody after the arrest, he would, under the circumstances stated, have been justified in so doing. But that is not the question here. The real point is, was the sheriff bound so to act? It is his duty to look at the writ, and arrest the person there named, and *Maurice Barnett* was not the person named there. It is said that it is hard on the plaintiff to lose the opportunity of arresting his debtor; but after all he is not free from blame. It was his fault originally in trusting a man whose name he did not know, which has produced all the inconvenience.

ABBOTT J. I am of the same opinion. The question made at the trial was, whether the sheriff might not, under this warrant, lawfully have arrested and detained *Maurice Barnett*. I then thought that he might, and I think so still; and that he might have justified, in an action for the false imprisonment, by averring that the party arrested was called *Godfrey*; for the name by which he has designated himself cannot as against him be considered other than

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his true name; and so the arrest would not be by a mistaken name as in the case cited from *Foster*. But I think that the sheriff was not bound so to do. He is directed by the warrant to arrest *Godfrey Barnett*, and he takes a man whom he supposes to be *Godfrey Barnett*. He is then informed, and the information turns out to be true, that his name is not *Godfrey* but *Maurice*. Then although he might lawfully have detained him, he is not *bound* so to do; for if he did, he would be taking upon himself a responsibility which the law does not throw upon him, and which might, in case of resistance, where death ensued, raise a very delicate question. He is not compellable therefore to expose himself to this peril. If the party complaining would make the sheriff liable, he must go further in his allegations and proofs: he should state and prove that he had a debt due from a party called by both names, and that he so told the sheriff at the time of the arrest. The sheriff might then perhaps be bound to detain him in custody, and might be liable for an escape. But here, as it seems to me, he might lawfully discharge the person arrested, and the rule for entering a nonsuit must therefore be made absolute.

HOLROYD J. I perfectly agree with the rest of the court that this action is not maintainable against the sheriff. Upon an issue between *Maurice Barnett* and the plaintiff, if the question was, whether *Maurice* was known by the name of *Godfrey*, the circumstance of having given his name as *Godfrey* would be sufficient to decide that issue against him: but as between any other person and the plaintiff, the using of the name upon one occasion only would not justify such a conclusion.

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Although the sheriff may be presumed to know the real names, and the names by reputation of all the persons within his bailiwick, yet it is manifestly impossible that he should know a man by a name which he has assumed upon one occasion only, and by which he is not generally known. Here *Maurice* would have been guilty of forgery if he had signed the name of *Godfrey* to a bill of exchange: although if *Godfrey* was the name by which he was generally known, he would only have been guilty of a fraud. When therefore the sheriff found that he had arrested a man not known by the name of *Godfrey*, and whose name was *Maurice*, although he might have been justified in detaining him, still he was not bound to do so at his peril.

Rule absolute for entering nonsuit.

JEUNE against WARD.

Saturday,
May 30th.

ACTION against defendant as acceptor of a bill of exchange for 150*l.* drawn by *J. G.* upon the defendant, in favour of the plaintiff *Jeune*. At the trial at the *London* sittings after *Hilary* term, before Lord *Ellenborough* C. J., it appeared that the defendant, together with another person of the name of *Stubbin*, was the co-executor of the will of a *Mrs. Leake*, under which the drawer *Godfrey* was entitled to a legacy of 200*l.* on his coming of age. In consequence of this, *Godfrey*, on the 28th *May* 1817, drew the bill on defendant in favour of the plaintiff, as a payment of his bill for goods sold and delivered. The plaintiff who lived in *London*, went over on the 29th *May*, to the defendant's

Where a bill of exchange, being presented and left for acceptance, was refused acceptance by the defendant, but remained afterwards for a considerable space of time in his hands, and was ultimately destroyed by him: Held, by three Justices, dissentiente Lord *Ellenborough* C. J., that the defendant was not thereby liable as acceptor of the bill.

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defendant's house in the country, with the bill, and there left it for the purpose of being accepted, but it did not very clearly appear what then passed between the plaintiff and the defendant. At a subsequent period, however, in *June*, the plaintiff called on Mr. *Egerton*, the agent for the defendant in *London*, and introduced himself to him by producing a letter from the defendant, and begged his assistance towards enabling him to obtain payment of the bill from the drawer. He then stated, that he had been before with the bill to the defendant, and that the defendant had refused to accept it. Mr. *Egerton* told him that defendant had done very right in refusing to accept the bill; that *Godfrey* was, on the 5th *July* to receive his legacy, and that he recommended plaintiff then to attend in order to secure the payment of the bill. Accordingly, on the 5th *July* the plaintiff attended; but, owing to some dispute as to the stamp for the receipt of the legacy, it was not paid on that day, *Godfrey* then refusing to receive it. It was afterwards paid to him. The plaintiff gave also in evidence a letter of the defendant's, in answer to an application for the bill, which stated that having been applied to by the mother of the drawer to give up the bill to them, which, during all this period, had remained in his hands, he had, to avoid further trouble, destroyed it. This case having been proved, Lord *Ellenborough* C. J. was of opinion, that it amounted in law to an acceptance of the bill by the defendant; and directed the jury to find a verdict for the plaintiff.

Topping having in last term obtained a rule nisi for setting aside this verdict, and for a new trial,

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Gurney now shewed cause. This conduct of the defendant amounted to an acceptance. For, first, he retained the bill beyond a reasonable time. The bill was left with him for acceptance on 29th *May*, and it remained with him till 9th *July*, when the defendant destroyed it. The principle laid down in *Harvey v. Martin* (a) must govern this case. There a person to whom a bill of exchange had been transmitted for acceptance, retained it for some time in his hands. The plaintiff wrote to know what had become of it, and then the defendant, who said that he had retained it because he had intended to accept it, declined accepting the bill. But that retention of the bill amounted in law to, and was held to be, an acceptance. So here the retaining of this bill, which was left for acceptance, for so long a period, makes the defendant liable. And besides, there is here the additional fact of the destruction of the bill. By that act the defendant prevented the plaintiff from ever suing the drawer. That falls within the case of *Trimmer v. Oddy* (b), where Lord *Kenyon* lays it down, that if a party put upon a bill that which essentially injures and defaces it, that makes him liable as acceptor. Here the case is much stronger, for the party has not merely defaced and essentially injured the bill, but has actually destroyed it. The verdict therefore is right.

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Topping and *Gaselee*, in support of the rule. There is one fact which materially distinguishes this case from all those which have been cited, viz. that here there is an absolute refusal to accept, given originally by the

(a) 1 *Campb.* 425. n.(b) *Guildhall* sittings, 1800, *Chitty on Bills of Exch.* 160.

defendant ;

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defendant; and no case can be found where, after such refusal to accept, a retaining of the bill has been held to be an acceptance. In *Harvey v. Martin* the judgment of the Court turns entirely on the ground of the usual course of dealing between the parties, there having been instructions to transmit the bills, &c. when accepted, to the agent of *Harvey*; but here there is no usual course of dealing, for this is an insulated transaction between the plaintiff and defendant, and that case therefore does not apply. *Trimmer v. Oddy*, and *Beattinck v. Dorrien (a)*, and *Thornton v. Dick (b)*, proceed upon a different principle: there the acceptor having once accepted, was not permitted to cancel or revoke his acceptance, and such cancellation was held to make no difference: but the liability was held to continue as if the acceptance had remained on the face of the bill. Here, however, there was not any acceptance, but on the contrary a refusal to accept. The case of *Clavey v. Dolbin (c)* is a decisive authority against this verdict, and is almost precisely similar in its circumstances to the present case. Besides, it is clear from the plaintiff's own conduct, that he did not consider the defendant liable, at a period long subsequent to the time when the bill was left. For he attended in *Egerton's* chambers at the end of *June*, for the purpose of getting payment from the drawer. That, however, was not necessary, if the defendant was then liable as acceptor. Then the destruction of the bill cannot amount to an acceptance. It may, perhaps, be the ground of an action against the defendant, but he cannot in consequence of that act be charged as acceptor: for in that character he can only be liable by the custom of merchants, and by that

(a) 6 East, 199.

(b) 4 Esp. 270.

(c) *Ca. temp. Hardw.* 278.

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custom the destruction of a bill does not amount to an acceptance.

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Lord ELLENBOROUGH C. J. I do not recollect that any question was made at the trial as to the correctness of *Gould's* evidence. His statement was, that the bill in this case was originally left with the defendant for acceptance, and by the defendant's own letter it afterwards appeared that the bill had been destroyed by him. I certainly at that time proceeded on the ground that it was the ordinary and recognized custom of merchants, that when a bill has been left for acceptance, if after a reasonable time has expired (and here a reasonable time had expired) the party omitted to return the bill, he must be considered as having retained it for acceptance. This case goes still further; for here the defendant by his own act puts it wholly out of his power ever to return it, and thereby deprived the holder, (there being no power of recreating the bill,) of the advantage of being able to prove the hand-writing of the drawer. In such a case I have always considered it as a matter of course that such retention and destruction of a bill of exchange was tantamount to an absolute refusal to redeliver it, and was therefore, in point of law, an acceptance. But it is contended that no case can be cited, which goes so far as this proposition. The principle laid down by Lord *Kenyon* in *Trimmer v. Oddy*, seems to me to govern this case. That decision, I well remember, made a considerable impression on my mind. In the ordinary course of business, when a bill is left with the acceptor, he is to consider whether he will accept it or return it. If he, without saying any thing, retains it in his hands,

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the law then presumes that he has done that for which the bill was left, and which is for the benefit of the party leaving the bill, viz. that he has accepted it. Here, however, it is said that *Ward* absolutely refused to accept, and it is contended that that circumstance makes the difference. But the period when he did this does not distinctly appear. It might be after a reasonable time had elapsed. Suppose the bill delivered to him on the 29th *May*; the meeting of *Egerton* and *Jeune* was not till the end of *June*, and the bill was not destroyed till the 9th of *July*. Then a reasonable time might have elapsed before the refusal took place, and a reasonable time did at all events elapse before the destruction. If so, the bill was in point of law then accepted by *Ward*, and the acceptance could not afterwards be retracted. If indeed the bill had not originally been left for acceptance, the whole case certainly would fall to the ground. But I think it clearly appears from the evidence that it was so left, and the defendant not having in a reasonable time notified his refusal to accept, and having ultimately destroyed the bill, must, as it seems to me, be held liable for it as the acceptor. I think, therefore, that this rule must be discharged.

BAYLEY J. I am not prepared to say that the defendant can, in the present case, be considered as the acceptor of this bill. The bill, as it appears from the evidence, was drawn on the 28th *May*, by *Godfrey*, on the defendant, and was payable at sight. And on the 29th *May* the plaintiff, having gone down from *London* to the defendant's house in the country for that purpose, made an application to him either for payment or acceptance of the bill; but it is not clear for which of

these two the application was made. No payment is then made, nor is there any reason to suppose that any acceptance was then given. For some reason, however, which does not appear, the bill was then left in the possession of the defendant, where it remained till the 9th July, the time when it was ultimately destroyed. Where a bill is, in the usual course of business, left for acceptance it is the duty of the party who leaves it to call again for it, and to inquire whether it has been accepted or not. It is not, as it seems to me, the duty of the other person to send it to him, unless, as in the case cited of *Harvey v. Martin*, there is a usual course of dealing between the particular individuals concerned, so to do. Here the party who left the bill does not appear ever to have called or sent for it; and that materially affects the present case. I forbear to say, at present, what would be my judgment on the effect of a destruction of the instrument by the party with whom it was left for acceptance, within the reasonable time during which the other party might expect an acceptance of the bill. If a party says he has destroyed the bill, and that he will not accept it, such destruction might probably subject him to an action of trover for the bill; but I cannot think that it would amount to an acceptance of it. For what is an acceptance? It is an engagement of the one party acceding to the proposition of the other; and it would be very strange indeed if a refusal on his part could in law be deemed an acceding to the proposition. But I give no judgment on this point; for the facts here do not warrant the conclusion that the bill was destroyed by the defendant during the period when the plaintiff could consider it as remaining for acceptance. It appears that at the

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end of *June* the plaintiff called on *Egerton*, and introduced himself to him by producing a letter from the defendant. All the circumstances which then came out shew plainly that this whole transaction was an insulated one between the parties, and that there was no course of dealing between them; for the drawer *Godfrey* was entitled to a legacy, and on that ground alone it was that he drew on *Ward*, the executor. The plaintiff then tells *Egerton* that the defendant had refused to accept the bill. He does not complain that the bill had been kept by him for an unreasonable time, but applies to *Egerton* for his assistance in obtaining the money. *Egerton* tells the plaintiff that *Ward* has done right in so refusing, and informs him that on the 5th *July* *Godfrey* will receive his legacy. On that day all the parties attend, but the money due on the bill does not appear to have been paid. Then after all this, on the 9th *July*, the defendant writes to the plaintiff that he has destroyed the bill. Now if that were a wrongful destruction by him, trover would lie against him, and he would in that form of action be subject to pay, not the whole bill as the acceptor of it, but only such damages as the party really sustained by this destruction. For if the drawer were a solvent person he would still be liable, and might pay the bill, either in the whole or in part. If, on the other hand, the destruction was excusable from the circumstances of the case, as if it appeared that the plaintiff had treated the bill as of no importance, and had shewn his intention of relying, not on the bill, but on the original consideration, then that would perhaps afford to the defendant an answer even to the action of trover. But at all events, either in the one case or the other, the destruction cannot, as it seems to

me, amount to an acceptance of the bill by the defendant. I think, therefore, that this rule should be made absolute.

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ABBOTT J. I am not able to satisfy my mind that, under the circumstances of this case, the defendant is liable as acceptor. There is no case similar in its facts to this; for this transaction is out of the course of the ordinary dealing between merchants. It appears that the defendant was one of two executors to a will, under which *Godfrey* was entitled to a legacy of 200*l.*, on the credit of which he drew the bill in question. The plaintiff does not send the bill by the post, or to any agent in the country, but goes himself with it, and returns without it; then, at the end of the month of *June*, he introduces himself by a letter to *Egerton*, and desires his assistance to secure the payment of the money. The bill, too, which was drawn on the 28th *May*, must have been placed by the plaintiff in the defendant's hands in the beginning of *June*, and the whole transaction ought to have been completed early in that month. We then find that the plaintiff, even at the end of that month, does not rely on the detention of the bill having amounted in law to an acceptance, but requests *Egerton* to help him to get the money from *Godfrey*, which could not have been necessary if *Ward* had then been liable. Now the account of the witnesses, both on one side and on the other, is this: *Gould* says that *Ward* admitted that the bill was left with him for acceptance; and *Egerton* states that the plaintiff told him that *Ward* had refused to accept the bill. And in fact the plaintiff does not then seem to have considered the defendant liable to him; and I

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 against
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cannot infer that the defendant, by retaining the bill, had then made himself liable as acceptor. And if he was not then liable, I do not think the subsequent destruction of the bill would make him so. I look with the greatest anxiety at these cases of constructive acceptance; for every decision of that kind introduces uncertainty upon a subject where the public interest requires that the greatest certainty should prevail. If indeed it were *res integra* it would be most desirable that the liability of the acceptor should be confined to the case of an actual acceptance on the face of the bill. I own that I wish the rule had been so laid down originally.

HOLROYD J. It seems to me that there is considerable doubt upon the present question. I have always understood that where a bill is left for acceptance, and is not returned when called for, and any act of ownership has been exercised with respect to the bill by the party with whom it was left for acceptance, that it amounted to an acceptance. But I cannot say that the mere non-return of the bill, unaccompanied with any act of disposing of it, is so. In this case, where there was a previous refusal, and where the plaintiff himself, at the end of *June*, seems not to have considered the defendant liable, I do not think that the subsequent destruction of the bill would make him answerable as acceptor. But, at all events, I think there should be a new trial in this case, in order that these facts may, if necessary, be put upon the record, and the case be further considered in a court of error.

Rule absolute.

1818.

FINLAYSON *against* M'LEOD.Monday,
June 1st.

THIS cause was referred by an order of nisi prius; the costs of the cause were directed to abide the verdict, and the costs of the reference and of the special jury were left in the discretion of the arbitrator, who by his award ordered a verdict to be entered for the plaintiff for part of his demand, but that he should pay the costs of the reference and *special jury*. *The special jury had been obtained upon the motion of the defendant.* Scarlett obtained a rule for setting aside the award pro tanto; on the ground that as the special jury had been obtained by the defendant, and the plaintiff had a verdict, that a Judge at nisi prius could not have deprived the latter of his costs; and that it was the intention of the parties to give to the arbitrator the same power only that would otherwise be exercised by the Judge.

A special jury having been obtained on the motion of the defendant, the cause was referred, and by the order of reference, the costs of the cause were to abide the event, and the costs of the reference and of the special jury were left in the discretion of arbitrator: Held, that the arbitrator cannot, after directing a verdict for the plaintiff, award that the latter should pay the costs of the special jury.

Richardson now shewed cause. The costs of the special jury are expressly left in the discretion of the arbitrator, and he has exercised it by awarding that they should be paid by the plaintiff: he has therefore not exceeded the authority entrusted to him, and the award is good.

The Court, however, thought that the fair meaning of the submission was, that the arbitrator should have the power of allowing the costs of the special jury as costs in the cause, if the party who moved for the same were to succeed.

Rule absolute.

1818:

DE TASTET *against* SHAW and Others.

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ACTION on a policy of insurance against defendants *Benjamin Shaw, Stephen Nicholson Barber, and Elizabeth Houstoun*, executors and executrix of *James Henry Houstoun*. Plea, that by indenture made between the said *James Henry Houstoun* of the first part, *Sir John Perring, Bart.*, the said *Benjamin Shaw*, and *Stephen Nicholson Barber*, and the said *James Henry Houstoun*, by descriptions of *Sir J. P., Bart., B.S., S. N. B.*, and the said *J. H. H.*, of *Cornhill*, bankers and copartners, of the second part, and one *Oliver Vill*, of the third part, after reciting, amongst other things, that the said *James Henry*, in his individual capacity of a merchant, was indebted to the said *Sir J. P., B.S., S. N. B.*, and *J. H. H.*, in a considerable sum of money, the amount of which could not then be exactly ascertained; and that the said *J. H. H.* might become indebted to them in further sums of money; and that for securing to the said *Sir J. P., B.S., S. N. B.*, and *J. H. H.* the payment of the said debt or sum of money then due or owing, or which might become due and owing to them from the said *J. H. Houstoun*, he had assigned certain property therein described to a trustee. The plea then stated the following covenant: And the said *James H. Houstoun* did thereby for himself, his heirs, executors, and administrators, covenant, promise, and agree with and to the said *Sir J. P., B.S., S. N. B.*, and *J. H. Houstoun*, their executors, administrators, and assigns, that he the said *J. H. Houstoun*, his heirs, &c. should and would on demand well and truly

truly pay or cause to be paid unto the said Sir *J. P.*, *B. S.*, *S. N. Barber*, and *J. H. Houstoun*, their executors, administrators, and assigns, the said debt or sum of money then due and owing, and also all and every sum and sums of money which at any time thereafter should become due and owing to them from the said *J. H. Houstoun* as aforesaid, and according to the true intent and meaning of the said indenture. The plea then stated, that the said sum of money wherein the said *J. Henry Houstoun* was so indebted to the said Sir *J. P.*, *B. S.*, *S. N.*, and *J. H.*, at the time of making the said indenture, then and there amounted to a large sum of money, to wit, the sum of 100,000*l.*; and that he the said *J. Henry* afterwards and in his lifetime, to wit, on the said 19th day of *August*, in the year of our Lord 1812, and on divers other days and times between that day and the death of him the said *J. Henry*, at, &c., became indebted to the said Sir *J. P.*, *B. S.*, *S. N.*, and *J. H. Houstoun*, in divers other large sums of money, amounting in the whole to another large sum of money, to wit, the further sum of 100,000*l.*, which said several sums of money, and each of them, and every part thereof, were due and unpaid at the time of the death of the said *J. Henry*, and now are due and owing to the said Sir *J. P.*, *B. S.*, and *S. N.*, to wit, at, &c. The plea then stated, that defendants had fully administered all and singular the goods and chattels which were of the said *J. Henry* at the time of his decease, which had come to their hands as executors and executrix, to be administered, except goods and chattels, to the value of 100*l.*, to wit, at, &c. And that they have not, nor on the day of exhibiting of the bill of the said *Fermin* in his behalf, or at any time

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time since, had any goods or chattels which were of the said *James Henry* at the time of his death in their hands, to be administered, except the said goods and chattels to the value of 100*l.*, which are not sufficient to pay and satisfy the said sum of 100,000*l.*, and 100,000*l.*, so due and owing to the said Sir *J. Perring*, *Benjamin*, and *Stephen Nicholson* as aforesaid, and which are charged and bound to the payment and satisfaction thereof. And this, &c. The second plea was confined to the debt due at the time of executing the deed. To these pleas there was a general demurrer and joinder, and the case was argued in last *Michaelmas* term by

Littledale, in support of the demurrer. This is not an outstanding specialty debt which can be enforced against the executors in a court of law: and therefore they cannot be permitted in this court to plead this by way of retainer. During the lifetime of the testator he could not have been sued upon this covenant, because he could not maintain an action against himself, and if that be so, his surviving partners cannot after his death maintain an action against his executors. *Moffatt v. Van Millingen* (a), and *Bosanquet v. Wray* (b), are authorities in point. This is therefore no more than an equitable debt, which the law will not notice, and the parties therefore should seek their remedy in those courts where the interest of all the creditors will be taken into consideration.

Gaselee, contra. An executor may retain for any debt, the payment of which can be enforced; and it is by no means true, as a general proposition, that courts

(a) 2 *Bos. & Pull.* 124. n.(b) 6 *Tamst.*

of law will not notice an equitable debt. *Pharmer v. Marchant* (a) is an authority to shew that a court of law will look to an equitable debt; and in *Stafro v. Powell* (b) it is laid down, that executors are bound to take the same notice of a decree in equity as of a judgment at common law. In *Lone v. Casey* (c) "it was holden, that a marriage trust for securing a provision to the wife might be given in evidence by her on a plea of plene administravit, in an action brought against her as executrix; and that she might retain out of the personal assets so much as was equal to the damages sustained by the breach of covenant." In that case the legal debt was due to the trustee, and the executrix had only a debt in equity. In *Toller's Law of Executors* (d) it is laid down, that an executor has an authority to retain wherever he might have been sued or have paid the debt. And *Weeks v. Gore* (e), and *Waring v. Danvers* (f), are cases in illustration of this principle. Now it is clear in this case that the executors might be sued in equity, and they certainly would have been justified in paying the debt that has accrued due in consequence of this breach of covenant. This then being a debt of which payment might be enforced, and which the executors would have been justified in paying, they are entitled to retain. And this plea therefore is good, and the defendant is entitled to judgment.

Littledale, in reply. The defendants would not have been justified at law in paying this debt, because the money due on the covenant could not be enforced in a

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(a) 3 Burr. 1380.

(b) 3 Lev. 355.

(c) 2 Bl. 965.

(d) P. 297.

(e) 3 P. Wms. 184 n.

(f) 1 P. Wms. 295.

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court of law; the parties therefore should sue in a court of equity where equal justice would be done to the several creditors. The cases cited to shew that courts of law will sometimes notice equitable debts are materially distinguishable from this case; for in all those cases there was once a legal debt existing, in this there never was. The case of *Shafto v. Powell* does not apply, for the debt there was upon a decree in a court of equity, and that constitutes a legal debt of as high degree as a judgment in a court of law. (a)

Cur. adv. vult.

Lord ELLENBOROUGH C. J. now delivered the judgment of the Court.

This was an action brought against the three executors of *James Henry Houstoun*, an underwriter, on a policy of insurance. The defendants have pleaded that two of them together with the testator *Houstoun* and another person were partners in a banking-house; that a deed was made between the testator *James Henry Houstoun* of the first part, the said two executors, the testator, and the fourth partner, of the second part, and a trustee of the third part. Whereby, after reciting that the testator was indebted in his individual capacity to the banking-house in a considerable sum of money, (the amount of which could not then be exactly ascertained), the testator assigned certain securities in trust to pay that debt and any further advances, and covenanted with the two executors, himself, and the fourth partner to pay such debt and future advances. The plea then sets forth the amount of the debt with a vide-

(a) *Cas. temp. Talb.* 218.

licit, and avers that it still remains unpaid, and has been increased by further advances to another sum mentioned also under a videlicet and plene administravit, præter 100*l.* which is not sufficient to pay the debt, and is liable thereto. There is another plea, which is confined to the debt due at the execution of the deed, not taking any notice of the further advances. To these pleas the plaintiff has demurred; and the question is, whether the debt secured by this deed may or may not be pleaded in this action as a specialty debt; or by way of retainer, two of the creditors under it being two of the executors of the debtor. And we are of opinion that it cannot. The testator, who was a partner in a house of trade, was indebted on his individual account to the partnership, that is to himself and others. The debt existing, but its amount being unascertained, he executed the deed in question, whereby he covenanted with himself and his partners to pay the debt; upon this deed no action could have been maintained in a court of law against the testator himself while living, or against his executors after his decease, even if all the executors had been strangers to the partnership; and therefore the deed upon which the defendants rely, does not shew any debt at law. But it was contended that it shews a debt in equity, and that a court of law ought to take notice of such a debt and give effect to it. It is obvious, however, that justice cannot be administered without affording the plaintiff an opportunity of controverting the amount of the debt; and the only mode in which a fact can be controverted in an action at law, viz. by taking an issue to be tried by a jury, is impracticable in the present case; because the debt constitutes an item in a partnership account,

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account, and the partnership account must be taken in order to ascertain how much was due at the execution of the deed, and whether the sum then due has been reduced in any and what degree by the intermediate gains of the partnership business. Such an account cannot be taken by a jury, and consequently no issue could be taken on the debt on which the defendants rely; and in this respect the present case differs from those cases of debts in trust which were quoted at the bar. There is no more difficulty in ascertaining the amount of a sum of money due under a bond or covenant to *A.* for the use of *B.*, than if it were due to *A.* for his own benefit. There was no difficulty, much less impracticability, of trial in those cases as there is in this. For these reasons we think the plea is bad, and there must be judgment for the plaintiff.

Judgment for plaintiff.

GURNEY *against* BULLER.

The statute 11 G. 2. c. 19. s. 22. gives double costs against a plaintiff in replevin only in three cases, viz. where he is nonsuit, discontinues his action, or has judgment given against him. And, therefore, where in replevin the cause not being then at issue, the parties agreed by bond to submit the question to arbitration, the costs to abide the event, and the arbitrator afterwards awarded in favour of defendant; it was held that he is not entitled to double costs under the statute.

REPLEVIN. The defendant avowed, as landlord for rent in arrear. Before the question had come to any issue, the parties, by bond, referred the whole matter to arbitration, and it was agreed that the costs should abide the event of the reference. The arbitrator having made his award in favour of the defendant, and the Master having allowed only single costs in the cause,

Adams

Adams moved for a rule nisi for the Master to review his taxation, in order that he might allow double costs under the statute 11 G. 2. c. 19. s. 22., by which it was enacted, "that if the plaintiff or plaintiffs in replevin should become nonsuit, discontinue his or their action, or have judgment given against him, her, or them, the defendant or defendants in such action shall recover double costs of suit." Here then, inasmuch as the arbitrator has awarded in favour of the defendant, he was entitled to double costs; for it was agreed that the costs should abide the event, which must mean the legal event. *Swinglehurst v. Altham*. (a) And there are other cases to the same effect. Then the costs which are to abide that event must be those costs which, if the case had proceeded, the defendant would have been entitled to receive.

Tindal shewed cause in the first instance. It is not to be disputed that "event" means "legal event." But the case here does not turn upon that point. For the statute only gives double costs to the defendant in three specific cases, viz. nonsuit, discontinuance, and judgment; neither of which has happened in this case. For the plaintiff has not become nonsuited, nor has he discontinued his action, nor had judgment given against him. The event, therefore, of this cause, not being one of the three modes contemplated by the statute, it does not fall within the words of the act; and the defendant is only entitled to single costs.

Adams, in reply, contended, that here, though there was no nonsuit or judgment, yet still there was that

(a) 3 T. R. 138.

which

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which was equivalent to a discontinuance of the suit by the plaintiff. But

LORD ELLENBOROUGH C. J. This case does not fall within the strict words of the statute, by which the remedy of the landlord against his tenant was extended in the case of distresses for rent, quit-rents, reliefs, heriots, and other services. Now in order to entitle the defendant to double costs, he must bring himself within the express words of the act, and the three particular cases there mentioned. Not having done so, he is not entitled to double costs, and the Master's taxation is right.

ABBOTT J. If the arbitrator had awarded a discontinuance, it would have been different; but that not being the case, the defendant is only entitled to single costs.

Rule refused.

— in Whithorn v. Aberdeen 2. Nov. 1817.

Tuesday.
June 2d.

KIRBY against SMITH.

Where a ship had sailed from *Elsineur* on her voyage home six hours before the owner, who followed in another vessel on the same day, and having met with rough weather on his passage, arrived first, and then caused an insurance to be effected on his own ship: Held that these circumstances were material to be communicated to the underwriter, and that it was not sufficient to state merely that the ship insured was "all well at E. on the 26th July," the day of her sailing.

ACTION upon a policy of assurance dated 9th August 1817, on the ship *Ocean*, from *Elsineur* to *Hull*. At the trial before the Lord Chief Baron, at the last assizes for the county of York, it appeared that the plaintiff being the owner of the *Ocean*, on the 26th July, and about six hours after the *Ocean* had

called

sailed from *Elsineur*, had left that port himself in another ship; that he arrived at *Hull* on the 9th of *August*, after having met with rough weather on his passage; and that on his arrival, finding that the *Ocean* had not arrived, he immediately instructed his broker to effect the insurance in question. The broker at the time of effecting the policy, did not communicate to the underwriter, that the *Ocean* had sailed six hours before the ship which had arrived on the 26th, nor the fact that the other ship had arrived; but merely said that the *Ocean* was all well at *Elsineur* on the 26th *July*. The *Ocean* was lost on her voyage from *Elsineur*. The average voyage from *Elsineur* to *Hull* is from eight to ten days, but some ships make it in four or five. The jury found a verdict for the plaintiff; and *Hullock* Serjt. having obtained a rule nisi for a new trial, on the ground that this was a concealment of a material fact, and that the policy was therefore void,

Scarlett and *Tindal* now shewed cause. The underwriter had notice by the policy itself (a), that the *Ocean* was at *Elsineur* on the 26th *July*, and by the *Sound* lists he might have learnt that the other vessel was also there on that day; and the arrival of that vessel at *Hull* must have been a fact well known to the defendant. It is notorious that vessels do not stay at *Elsineur* longer than the payment of the *Sound* duties requires; and the assured might well be silent, as to matters necessarily within the knowledge of the underwriter. The policy, therefore, stating that the vessel was at *Elsineur* on the 26th, the underwriter might have well concluded that she left it on that day, and

(a) The policy was "from the 26th *July* inclusive."

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then it would not be material to communicate the exact hour at which her departure took place. There was therefore no concealment of any material fact not within the knowledge of the underwriter.

Hullock Serjt. and *Richardson*, contra, were stopped by the Court.

LORD ELLENBOROUGH C. J. I cannot entertain any doubt upon this subject. The question in these cases always is, whether the fact be material to the underwriter so as to enable him to form his estimate of the value of the risk. The ship *Ocean* in this case had in all probability encountered six hours more of tempestuous weather than the other vessel in which the owner had arrived, and the smallest difference on these occasions is often very material; inasmuch as a vessel may thereby be thrown into the way of other winds. I remember a case of two vessels, one of which sailed to *Nova Scotia* and back, before the other had made any material progress in her voyage, and that only from the circumstance of having the advantage of a few hours start. Now in this case, the fact of the *Ocean* having sailed six hours before the other ship might have been very material, and might have induced the underwriter to pause before he took the risk. I am of opinion, therefore, that the sailing of the other vessel, six hours later than the *Ocean*, was a circumstance which ought to have been communicated to the underwriters, and that this rule must be made absolute.

BAYLEY J. I am also of opinion, that this was a concealment of a material fact. The plaintiff knew that the

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the *Ocean* had sailed before the other vessel, and that the latter had met with rough weather on her passage to *England*. The voyage it appears is sometimes completed in four or five days, and the average duration is from eight to ten days. Now the vessel which had arrived had been fourteen days on her passage. It is said that communication was made that the ship was all well at *Elsineur* on the 26th *July*; but the natural conclusion from that representation would be, that she was left there well at that time; which was contrary to the fact. Nor can the knowledge of the usual custom as to the stay of vessels at *Elsineur* raise a necessary presumption that being there on the 26th *July*, she must have also sailed from *Elsineur* on that day; for her sailing would depend, of course, upon the weather, and upon her state of repair, both of which might cause considerable delay. The fact, therefore, itself ought to have been stated to the underwriters.

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ABBOTT J. I am entirely of the same opinion. The fact of the owner having subsequently sailed in another vessel, and having himself experienced rough weather ought, undoubtedly, to have been communicated to the underwriters.

HOLROYD J. concurred.

Rule absolute.

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*Wednesday,
June 3d.*STONEHOUSE *against* RAMSDEN.

Where defendant, a prisoner, after the issuing the writ of hab. corp. for bringing him up to be charged in execution, sues out and obtains the allowance of a writ of error; he cannot be charged in execution, but must be remanded to his former custody.

A WRIT of habeas corpus cum causa having been issued for the purpose of bringing up the defendant, who was a prisoner in the *Fleet*, for the purpose of charging him in execution in the present suit, the defendant, subsequently to the issuing of the writ, sued out and obtained the allowance of a writ of error. And now, being brought up into court,

Gaselee moved, that he might be so charged in execution, and now committed to the custody of the marshal. Here at the time the habeas corpus was sued out there was no writ of error, and the defendant has improperly employed the time allowed by law before he can be compelled to be brought up for this purpose, which the Court will not allow.

Campbell, who appeared for the defendant, contended that the defendant must be remanded to his former custody, and compared this to the case where, after a ca. sa. has been issued against a defendant, and before he is taken under it, there is an allowance of a writ of error. In that case the party cannot afterwards be apprehended. So here, he cannot be charged in execution in the present suit.

The Court being of this opinion, ordered that the defendant should accordingly be remanded to the *Fleet*, and

Gaselee took nothing by his motion.

See Longhi v. Spencer L. C. 12th 439

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DICKINSON, Assignee of BOOTH, against
COWARD.

Thursday,
June 4th.

ASSUMPSIT for goods sold and delivered, &c.

Plea, general issue. At the trial before *Bayley J.* at the last assizes for the county of *Lancaster*, it appeared in evidence that the defendant, having purchased goods of the bankrupt, attended a meeting of the commissioners of bankrupt, and produced an account between the bankrupt and himself, claiming at the same time certain deductions for overcharges and short measures on other goods which he had purchased of the sheriff under an execution against the bankrupt. The commissioners informed him he was not entitled to these deductions: on the following day, however, the defendant paid the plaintiff the balance of the account, after making such deductions. The action was brought to recover the sum of money so deducted. The defendant had not given any notice to dispute the petitioning creditor's debt, act of bankruptcy, &c.; and the proceedings under the commission were not produced. The defendant's counsel objected that there was not any evidence of the plaintiff's being the assignee of *Booth*. The learned Judge directed the jury to find a verdict for the plaintiff, with liberty to the defendant to move to enter a nonsuit. A rule nisi having been obtained in last *Easter* term for that purpose,

The defendant (in an action at the suit of the assignee of a bankrupt) had attended a meeting of the commissioners, and exhibited the account between him and the bankrupt, and afterwards made a part-payment to the plaintiff on that account: Held, in an action for the balance remaining due, that this was *prima facie* evidence, as against the defendant, that the plaintiff was assignee, and that it was not necessary to produce the proceedings under the commission, the defendant not having given notice of his intention to dispute the bankruptcy.

Topping and *Richardson* now shewed cause. It may be laid down as a general rule, that where a defendant, in the course of the transaction on which the action is founded, has admitted the title by virtue of which the

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plaintiff sues, it amounts to *prima facie* evidence, that the plaintiff is entitled to sue in that character, *Smith v. Taylor (a)*, *Peacock v. Harris (b)*, *Berryman v. Wise. (c)* Now here the defendant has treated with, and made a payment to, the plaintiff, as the representative of the bankrupt, and it not being shewn that he represents him in any other character, it must be presumed that he represents him in the character in which he sues, viz. that of assignee. The circumstances, indeed, of the payment being made the day after a meeting of commissioners of bankrupt, and of the defendant's not having given any notice of his intention to dispute the plaintiff's title, afford the strongest grounds for believing that he expressly treated the plaintiff as assignee of the bankrupt.

Hullock Serjt. and Parke, contra. It was incumbent on the plaintiff to prove an act of bankruptcy, a petitioning creditor's debt, and the issuing of a commission. The proceedings themselves would have been sufficient evidence of those facts; the evidence given at the trial, however, does not establish that the plaintiff was assignee of *Booth* under a commission of bankruptcy; the utmost effect that can be given to it is that the plaintiff represented him in some character or other; it is perfectly consistent with all the facts in evidence that the plaintiff may have acted and received the money as trustee for creditors, as agent to the bankrupt, or even as solicitor under the commission. These facts, therefore, do not establish that he actually did act as assignee of the bankrupt, but only that he may have acted in that character as well as in others.

(a) 1 N. R. 208. per *Heath J.*
 (c) 4 T. R. 366.

(b) 10 East, 104.

LORD ELLENBOROUGH C. J. I am of opinion that the facts proved in this case afford sufficient *primâ facie* evidence that the plaintiff was the assignee of *Booth*. It appears, that the defendant, being indebted to *Booth* as the purchaser of goods, attended a meeting of commissioners of bankrupt, and exhibited an account between him and the bankrupt, claiming certain deductions, and that he afterwards made the plaintiff a part-payment. It is clear, therefore, that he treated with the plaintiff, as the representative of *Booth*; and considering that he attended at a meeting of commissioners of bankrupt, and that he did not take the necessary measures to dispute the title in which the plaintiff sues, I think it must be taken that he treated with him as assignee. It certainly is not conclusive evidence, and it was competent to the defendant to shew that the plaintiff bore any other character; but I take it to be quite clear, that any recognition of a person standing in a given relation to others is *primâ facie* evidence against the person making such recognition that that relation exists. If indeed it were made in a loose conversation, I should consider the evidence but very slight; but here a part-payment is made. I have, therefore, no doubt that this was sufficient evidence of the plaintiff's being assignee, and that this rule, therefore, must be discharged.

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BAYLEY J. I think that the part-payment made by the defendant to the plaintiff on account of *Booth* was sufficient *primâ facie* evidence that he was his representative in some character or other; and the defendant has not shewn that the plaintiff bore any

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other relation to *Booth* than that of assignee, the character in which he has sued.

ABBOTT J. I am of the same opinion. It is in evidence, that a payment was made by the defendant to the plaintiff, on account of *Booth*; then it is said, that this payment was not made to the plaintiff in the character of assignee, but that it might have been made to him as trustee, as agent, or as solicitor to the commission. It must, however, be recollected, that the defendant attended a meeting before the commissioners of bankrupt, and that he afterwards made the payment to the plaintiff. That circumstance of itself raises a strong presumption that he paid it to him as assignee. If the defendant, however, had doubted whether he bore that character, it was competent to him to put that fact in issue, by giving the requisite notice, and not having done so, it must be taken as against him, that he made the payment to, and treated with, the plaintiff in that character in which he has sued, viz. as assignee of *Booth*, under a commission of bankruptcy. I am therefore of opinion, that the facts in this case were sufficient *prima facie* evidence that the plaintiff bore that character, and that this rule therefore must be discharged.

HOLROYD J. concurred.

Rule discharged.

1818.

ADAMS and Others against LINDSELL and
Another. (a/

Friday,
June 5th.

ACTION for non-delivery of wool according to agreement. At the trial at the last *Lent* assizes for the county of *Worcester*, before *Burrough J.* it appeared that the defendants, who were dealers in wool, at *St. Ives*, in the county of *Huntingdon*, had, on *Tuesday* the 2d of *September* 1817, written the following letter to the plaintiffs, who were woollen manufacturers residing in *Bromsgrove, Worcestershire*. "We now offer you eight hundred tods of wether fleeces, of a good fair quality of our country wool, at 35s. 6d. per tod, to be delivered at *Leicester*, and to be paid for by two months' bill in two months, and to be weighed up by your agent within fourteen days, receiving your answer in course of post."

This letter was misdirected by the defendants, to *Bromsgrove, Leicestershire*, in consequence of which it was not received by the plaintiffs in *Worcestershire* till 7 P. M. on *Friday, September* 5th. On that evening the plaintiffs wrote an answer, agreeing to accept the wool on the terms proposed. The course of the post between *St. Ives* and *Bromsgrove*, is through *London*, and consequently this answer was not received by the defendants till *Tuesday, September* 9th. On the *Monday September* 8th, the defendants not having, as they expected, received an answer on *Sunday September* 7th, (which in case their letter had not been misdirected, would have been in the usual course of the post,) sold the wool in question to another person. Under these circum-

A. by letter offers to sell to *B.* certain specified goods, receiving an answer by return of post; the letter being misdirected, the answer notifying the acceptance of the offer arrived two days later than it ought to have done; on the day following that when it would have arrived if the original letter had been properly directed, *A.* sold the goods to a third person: Held that there was a contract binding the parties, from the moment the offer was accepted, and that *B.* was entitled to recover against *A.* in an action for not completing his contract.

(a/ see *Routledge v. Grant & Bing* 652

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circumstances, the learned Judge held, that the delay having been occasioned by the neglect of the defendants, the jury must take it, that the answer did come back in due course of post; and that then the defendants were liable for the loss that had been sustained: and the plaintiffs accordingly recovered a verdict.

Jervis having in *Easter* term obtained a rule nisi for a new trial, on the ground that there was no binding contract between the parties,

Dauncey, *Puller*, and *Richardson*, shewed cause. They contended, that at the moment of the acceptance of the offer of the defendants by the plaintiffs, the former became bound. And that was on the *Friday* evening, when there had been no change of circumstances. They were then stopped by the Court, who called upon

Jervis and *Campbell* in support of the rule. They relied on *Payne v. Cave* (a), and more particularly on *Cooke v. Oxley*. (b) In that case, *Oxley*, who had proposed to sell goods to *Cooke*, and given him a certain time at his request, to determine whether he would buy them or not, was held not liable to the performance of the contract, even though *Cooke*, within the specified time, had determined to buy them, and given *Oxley* notice to that effect. So here the defendants who have proposed by letter to sell this wool, are not to be held liable, even though it be now admitted that the answer did come back in due course of post. Till

(a) 3 T. R. 148.

(b) 3 T. R. 653.

the plaintiffs' answer was actually received, there could be no binding contract between the parties; and before then, the defendants had retracted their offer, by selling the wool to other persons. But

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The Court said, that if that were so, no contract could ever be completed by the post. For if the defendants were not bound by their offer when accepted by the plaintiffs till the answer was received, then the plaintiffs ought not to be bound till after they had received the notification that the defendants had received their answer and assented to it. And so it might go on ad infinitum. The defendants must be considered in law as making, during every instant of the time their letter was travelling, the same identical offer to the plaintiffs; and then the contract is completed by the acceptance of it by the latter. Then as to the delay in notifying the acceptance, that arises entirely from the mistake of the defendants, and it therefore must be taken as against them, that the plaintiffs' answer was received in course of post.

Rule discharged.

¹²¹
ELTHAM against KINGSMAN.

Friday,
June 5th.

TROVER for a watch. Plea, not guilty. At the trial before *Part J.* at the last assizes for the county of Gloucester, it appeared that the plaintiff and one *Brown*

Semble, that a wager between the proprietors of two carriages for the conveyance

of passengers for hire, that a given person should go by one of these carriages, and no other, is illegal.

But held, at all events, (the wager having been deposited in the hands of the stakeholder,) that either party having demanded his deposit before the wager was won, was entitled to have it returned to him, and on refusal to maintain an action against the stakeholder.

respec-

*(121) An observation on Ld. Eldon's judgment
in this case in Murray v. Bredwell 2 Mass 1 W. 6. 373, 2,*

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respectively were proprietors of carriages called *Fly by Nights*, which they let to hire at *Cheltenham*, and that the following wager was laid between them : The plaintiff betted his watch against *Brown's*, that a Colonel *Longford* should go in his (*Eltham's*) *Fly by Night*, and no other, that evening to the assembly-rooms. *Brown* accepted the wager, and both watches were deposited in the hands of the defendant as a stakeholder. Within a very short time after the wager was laid, and before the event happened upon which it was to be determined, the plaintiff demanded his watch of the defendant, and insisted upon its being returned : it was not returned, and *Brown* having ultimately won the wager, the defendant refused to return the plaintiff his watch, but delivered it to *Brown*. The learned Judge was of opinion, that the plaintiff having demanded his watch before the wager was determined, was entitled to recover, and directed the jury to find a verdict for him, at the same time giving the defendant leave to move to enter a nonsuit ; and in last *Easter* term, a rule nisi having been obtained for that purpose,

Jervis and *Puller* now shewed cause. The plaintiff having demanded his watch before the wager was lost, is entitled to recover. The defendant was a stakeholder, a mere agent acting under a countermandable authority, which may be revoked at any time before that authority was executed, viz. in this case, before the plaintiff's watch was applied to the purpose for which it was deposited. *Taylor v. Lendey*. (a) *Cotton v. Thurland*. (b) This too is an executory contract, and

(a) 9 East, 49.

(b) 5 T. R. 405.

while

while it remained executory it was competent to either party to rescind it. *Selwyn's N. P.* (a) And the plaintiff having in fact rescinded the contract by demanding his watch, is entitled to recover the same from the defendant. But at all events the Court will not now interfere to alter this verdict. For it is unfit that courts of justice should be occupied in the discussion of frivolous questions, in which the parties have no real interest, to the prejudice of those suitors whose valuable rights are waiting the decision of the Court. In *Henkin v. Guers* (b) the Court of K. B. held that a wager on a point of practice was not a fit question to be tried; and in *Squires v. Whisken* (c) Lord *Ellenborough* C. J. refused to try a wager on a cock-fight, because the discussion of such a question tended to the degradation of courts of justice, and was inconsistent with that dignity which it is essential to the public welfare that a court of justice should always preserve.

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Campbell contra. This wager is not against public policy, nor injurious to the character or feelings of a third person: it does not lead to indecent evidence, and it has no immoral tendency; it is therefore a lawful wager. [*Abbott J.* I doubt whether this wager be legal: the effect of it would be to subject a third party to great inconvenience, by exposing him to the importunities of the proprietors of these vehicles: any person who has walked through *Piccadilly* must be sensible that this is no small inconvenience.] It may be very expedient that the law upon this subject should be altered by act of parliament; but as the law now stands, a legal

(a) 91. n.

(b) 12 East, 247.

(c) 3 Campb. N. P. C. 140.

wager

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wager is a contract attended with all the qualities and consequences of any other contract, and therefore it can as little be rescinded as created without the consent of both the contracting parties. Here an action might have been maintained by *Brown* as winner of the wager, which is quite inconsistent with the notion that it could be rescinded by the loser. The consideration whether any particular wager be or be not too frivolous for the dignity of the Judge is quite novel, and can afford no means of ascertaining in what cases the action will be held maintainable. Actions upon wagers quite as frivolous as the present have frequently been maintained and sanctioned by Judges of the first eminence in the profession. *Pope v. St. Leger.* (a) *Bulling v. Frost.* (b) *M^cAllister v. Haden* (c), and *Hussey v. Crickitt.* (d) It will therefore be a new doctrine to say, that an action cannot be maintained upon such a wager as the present, or that the subject matter of the wager being deposited in the hands of a stakeholder to abide a particular event, shall be recovered back after that event has happened. In all the cases cited where the money has been recovered back from the stakeholder, the wager itself was illegal.

LORD ELLENBOROUGH C. J. In most of the cases the question of illegality has not been so fully considered as it might have been; for hardly any thing that can be called *sponsio ludicra* can subsist without inconvenience to some person or other. A wager (like the present) that a gentleman should go by one of these

(a) 1 *Salk.* 344.(c) 2 *Campb.* 438.(b) 1 *Esp. N.P. C.* 236.(d) 3 *Campb.* 168.

convey-

conveyances rather than another, (the decision of which would expose him to improper importunity and interruptions, and would abridge the exercise of his right of electing his own conveyance,) certainly exposes him to some inconvenience. What has been said of the inconvenience subsisting in *Piccadilly* is applicable to this case, and arises from the same circumstances. This wager then being pregnant with these consequences to other parties, seems to me to be illegal. Independently, however, of this circumstance, I think there is no distinction between the situation of an arbitrator and that of the present defendant, for he is to decide who is the winner and who is the loser of the wager, and what is to be done with the stake deposited in his hand. Now an arbitrator's authority before he has made his award is clearly countermandable; and here before there has been a decision, the party has countermanded the authority of the stakeholder. The misapplication, too, of the public time, by occupying the attention of the Court in deciding upon foolish wagers of this description, to the prejudice of more important business, affords a further argument against this action. The case, therefore, is full of inconvenience in the various aspects in which it may be viewed. The least that can be said of such a wager is, that it was foolish, and then a Judge ought not to be called upon to decide such a question; but at all events the situation of the defendant cannot be distinguished from that of an arbitrator, whose authority is countermandable, and in that case the verdict is right.

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BAYLEY J. I think this verdict is right. This was a wager, which for the present I will not call illegal but

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but foolish, and tending to annoy a particular individual, and waste time in a court of justice; then I think, that in such a case it is competent to either party, before the event, to rescind the wager, and insist upon having his stake back again. This case is perfectly new in its circumstances, so that in coming to this conclusion, we break in upon no decided authority. If the wager be illegal, there can be no doubt; but if it be not illegal, still if the party may rescind it, as it appears to me he may do, the conclusion to which the jury have come is right.

ABBOTT J. The Court ought to endeavour to put a stop to wagers of this description as far as they can consistently with the rules of law; and I think that a Judge at nisi prius would best exercise his discretion by refusing to try questions arising out of them; for many persons, who have important questions affecting their rights before the Court, are improperly delayed by the time that is consumed in these idle discussions. Now the utmost that can be said in favour of this wager, is that it was only foolish; and a man who has made a foolish wager, may rescind it before any decision has taken place. It was therefore competent for the party so to act in this case, and having so done, it was the duty of the stakeholder to restore the watch to him. But that is not the only view that in my judgment may be taken of this case; for the tendency of such a wager may be not only to produce inconvenience to a third party, but even to the public; for the wager might be laid, not merely to carry one or two persons, but thirty or forty, and so great tumult, confusion, and disturbance might be produced. It was, therefore, illegal,

and being so, the defendant could not be justified in retaining the stake deposited.

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HOLROYD J. I am of the same opinion. I have been much impressed with what fell from my brother *Abbott* as to the illegality of the wager. For it is one clearly productive of great inconvenience. The plaintiff in this case, has brought the action for the watch, the event not having happened at the time when he demanded it back. It is contended, that it had been delivered by him to the defendant, with an authority which was not revocable because another person had then an interest in it. But in the case of an arbitrator his authority may be revoked by either party before the award made, and that even though the other party to the suit has an interest in the award. And besides, until that event happened which was to decide the wager, the property in the watch remained in the plaintiff, and the other party had no interest in it, but only in the contract: the defendant therefore ought to have returned it to the plaintiff, and left *Browne* to bring his action for it, if he thought himself entitled to it. The case might be different, if the event had happened before the demand was made. The jury have therefore come to a right conclusion.

Rule discharged.

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Friday,
June 5th.

GIBBONS and Others *against* M'CASLAND, Executrix of O. M'CASLAND, deceased.

Defendant, having entered into a guarantee in writing, and become liable upon it at a period of more than six years before the commencement of the suit, verbally promised within six years that the matter should be arranged: and afterwards on an action being brought pleaded *actio non accrevit*, &c.: Held, that the statute of frauds having been once satisfied by the original promise being in writing, it was not necessary, in order to take the case out of the statute of limitations, that the latter promise should also be in writing.

THE declaration stated, that *O. M'Casland*, deceased, had delivered to plaintiffs an order for goods to be shipped for and on account of one *Samuel Span*, on board a ship therein named for *Trinidad* and thereupon, to wit, on the 24th day of *August*, 1808, in consideration that plaintiffs, at the request of *O. M'Casland*, would execute the order; and in pursuance thereof would ship on board the said ship for *Trinidad* for and on account of *Span*, the goods so ordered, he, *M'Casland*, afterwards, to wit, on the day and year last aforesaid, undertook to be answerable for the payment of the same. Averment, that plaintiffs did execute the order and ship on board the ship therein named for *Trinidad*, for and on account of *Span*, the goods so ordered, amounting in value to 323*l.*, of which *O. M'Casland* had notice. By reason whereof he became liable to pay according to the tenor and effect of his promise. Breach, that although a reasonable time for the payment of the money had long since elapsed, yet that the same had not been paid, either by the testator in his lifetime, or by his executor since his death. Plea, first, *non assumpsit*; secondly, the cause of action did not accrue within six years. Replication, that the writ was sued out in *Michaelmas* term 1817, and that the cause of action accrued within six years before the issuing of the writ. At the trial before *Park J.* at the last assizes for the county of *Gloucester*, the plaintiffs proved he guarantee of the 24th of *August* 1808, as stated in the declaration, and that goods had been duly shipped according

according to the order. It was further proved that the guarantee was exhibited to *McCasland* the deceased, in November 1811; that he then said "he remembered it perfectly well, and that when he was able it should be arranged," and that the writ had issued within six years from that time. Upon these facts, the learned Judge was of opinion that the statute of frauds having required the contract itself to be in writing, it was necessary, in order to take it out of the statute of limitations, that the revival of the contract should also be in writing, and the plaintiff was nonsuited. A rule nisi for setting aside this nonsuit, having been obtained in *Easter* term,

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GIBBONS
against
M'CASLAND.

Puller now shewed cause. This action is founded upon the special contract stated in the declaration, and the issue is, whether any cause of action has accrued within six years upon *that contract*. The breach (which consists in the deceased not having performed the special contract) was committed in 1808. The cause of action therefore accrued at that time; and the statute of limitations having enacted that all actions upon the case shall be commenced within six years after the cause of such action accrued, and not after, at the expiration of the six years the plaintiffs' right of action was gone, and after that time no action could be maintained upon the original contract of 1808. This action therefore can be founded only upon the ground that the promise in 1811 created a new contract between the parties; but, supposing that to be so, the statute of frauds requires that that contract should be in writing, and not being in writing this action cannot be supported. In *Boydell v. Drummond* (a), Lord Ellen-

(a) 2 Campb. 162.

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borough C. J. is reported to have said, "if a man acknowledges the existence of a debt, barred by the statute, the law has been supposed to raise a new promise to pay it, and thus the remedy is revived; but no such effect can be given to an acknowledgment where the cause of action arises from the doing or omitting to do some act at a particular moment, in a breach of contract." In this case, the cause of action accrues from the testator's having omitted to do that which the special contract required, and which he was bound to do if he had been applied to within six years. This is a special contract and a special breach, and is therefore different from the case of a debt, where, as often as you acknowledge it, the law implies a promise to pay, and the right of action becomes complete.

Jervis, *contra*. This action is founded upon the original contract, and although the plaintiffs rely upon the subsequent promise to take the case out of the statute of limitations, still they may declare upon the original contract, *Leaper v. Tatton*. (a) He was then stopped by the Court.

LORD ELLENBOROUGH C. J. It seems to me that the difficulty in this case arises from considering together two statutes which have no relation to each other. The statute of frauds requires the promise to be in writing; but being once satisfied, as it has been by a writing in this case, it may be dismissed entirely from the consideration of the Court, and then the only question will be whether the statute of limitations has also been satisfied by the acknowledgment here made. Now,

(a) 16 *East*, 420.

the words used by the defendant are, "it shall be arranged," which admit every thing necessary to sustain the plaintiffs' action: for the defendant, at that time only spoke of his then present incapacity to satisfy a debt, which he thereby acknowledged as existing in a recoverable shape. This, therefore, is a recognition of a subsisting liability, and is sufficient, whatever the form of the original promise might have been, whether in writing or otherwise, to take the case out of the statute of limitations.

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BAYLEY J. To satisfy the statute of frauds, there must be a promise in writing, and to take the case out of the statute of limitations, there must be a promise within six years. Both these requisites concur in the present case. It is said that the acknowledgment must be in writing: but that is not necessary, for the defendant's liability is fixed by the original promise in writing, and the acknowledgment within six years is only to shew that that liability has not been discharged. The object of the statute of limitations was to protect parties who might have paid their debts, and have lost the vouchers by which such payments might have been established. In this case, if, at the time the testator said it should be arranged, the amount of the debt had been mentioned, it would have been sufficient to fix the defendant on the account stated.

ABBOTT and HOLROYD Js. concurred.

Rule absolute.

1818.

Saturday,
June 6th.

CLARKE against RICE.

In an action founded upon the statute 25 Geo. 2. c. 36. by one of the two inhabitants who had given information, &c. to the parish constable of *A. B.* keeping a bawdy-house, in consequence of which *A. B.* was prosecuted to conviction, it is necessary, in order to entitle the plaintiff, upon such conviction, to recover the reward of 10*l.* from the overseers, that the prosecution should have been conducted by the parish constable; and therefore where the two inhabitants had taken upon themselves to conduct it, it was holden that they were not entitled to the reward, and that a demand upon the overseer stating the prosecution so to have been carried on, was insufficient to entitle them to an action for the double penalty given by the act in case of a neglect or refusal by the overseer to pay such sum of 10*l.* on demand.

DECLARATION in debt, in the general form prescribed by the 25 Geo. 2. c. 36. s. 13. Plea, Not guilty. The plaintiff was an inhabitant of the parish of *St. George the Martyr, Southwark*, of which parish the defendant was overseer; and this action was brought in consequence of his having refused to pay the sum of 10*l.* to the plaintiff, who, together with another inhabitant of the parish, had given information which led to the conviction of a person keeping a bawdy-house there. At the trial before *Graham* Baron, at the last assizes for the county of *Surrey*, it appeared in evidence that the plaintiff and another inhabitant paying scot and lot gave notice in writing to the constable of the parish, that *A. B.* kept a bawdy-house within the parish; and that they then went before a justice of the peace, with the constable, and made oath of the truth of the contents of such written notice, and they and the constable entered into the recognizances respectively required by the statute. The prosecution, however, was conducted by the two inhabitants, of whom the plaintiff was one, and not by the constable. And the demand of the 10*l.* made upon the overseers stated the prosecution to have been so conducted.

Upon this it was objected by the defendant's counsel, that the inhabitants having taken the conduct of the prosecution upon themselves, had not brought themselves

within

within the act of parliament (*a*), which directed the constable to prosecute, and therefore that this action could not be maintained. The learned Judge being of this opinion, directed a nonsuit. A rule nisi for setting aside this nonsuit having been obtained last *Easter* term,

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Gurney and *Lanes* now shewed cause. The plaintiff can only be entitled to recover the penalty upon the terms of the act of parliament being complied with, one of which is, that the prosecution shall be conducted by

(*a*) 25 *Geo. 2. c. 36. s. 5.* " And in order to encourage prosecutions against persons keeping bawdy-houses, gaming-houses, or other disorderly houses, be it enacted, by the authority aforesaid, That if any two inhabitants of any parish or place, paying scot and bearing lot therein, do give notice in writing to any constable (or other peace officer of the like nature where there is no constable) of such parish or place, of any person keeping a bawdy-house, gaming-house, or any other disorderly house, in such parish or place, the constable or such officer as aforesaid, so receiving such notice, shall forthwith go with such inhabitants to one of His Majesty's justices of the peace of the county, city, riding, division, or liberty in which such parish or place does lie, and shall, upon such inhabitants' making oath before such justice, that they do believe the contents of such notice to be true, and entering into a recognizance in the penal sum of 20*l.* each to give or produce material evidence against such person for such offence, enter into a recognizance in the penal sum of 30*l.* to prosecute with effect such person for such offence, at the next general or quarter session of the peace, or at the next assizes to be holden for the county in which such parish or place does lie, as to the said justice shall seem meet; and such constable or other officer shall be allowed all the reasonable expences of such prosecution, to be ascertained by any two justices of the peace of the county, city, riding, division, or liberty where the offence shall have been committed, and shall be paid the same by the overseers of the poor of such parish or place; and in case such person shall be convicted of such offence, the overseers of the poor of such parish or place shall forthwith pay the sum of 10*l.* to each of such inhabitants; and in case such overseers shall neglect or refuse to pay to such constable or other officer such expences of the prosecution as aforesaid, or shall neglect or refuse to pay, upon demand, the said sums of 10*l.* and 10*l.*, such overseers, and each of them, shall forfeit to the person entitled to the same, double the sum so refused or neglected to be paid."

N.B. This act is made perpetual by 28 *Geo. 2. c. 19.*

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the parish constable. He it is who is to enter into a recognizance in the penal sum of 30*l.* to prosecute with effect, whereas the two inhabitants are only to enter into a recognizance in the sum of 20*l.* to give or produce material evidence against the person prosecuted. The constable too, is to be allowed the expences of the prosecution, and upon conviction the two inhabitants are to be paid (not the expences of prosecution) but only the sum of 10*l.* It clearly therefore appears to have been the intention of the legislature that the prosecution should be conducted by the parish constable, and not by the two inhabitants, and the plaintiff cannot be entitled to recover this penalty under the act of parliament. For the same reason the demand upon the overseers is also insufficient, in not shewing the plaintiff to be entitled to the 10*l.* under the act of parliament, for it only states the prosecution to have been conducted by the two inhabitants, and not by the constable. The nonsuit therefore was right.

Marryat and Chitty, contra. The object of the legislature was the encouragement of prosecutions against persons keeping disorderly houses: that object may be as well effected by leaving the conduct of the prosecution to those who are most inconvenienced by the nuisance, as by intrusting it to the parish constable: the act in terms only requires that the constable should enter into a recognizance, and not that he should prosecute; for by the 7th section he is only liable to a penalty for wilful negligence, and he cannot be said to be guilty of wilful negligence by merely suffering those to conduct the prosecution who must have the greatest interest in its ultimate success: inasmuch therefore as the act does not expressly require that the prosecution should

should be conducted by the constable, and as the general intention of the legislature will be equally answered by leaving the conduct of the prosecution in the hands of the inhabitants, the act of parliament has been complied with, and the plaintiff here is entitled to recover the penalty. Then if the prosecution has been properly conducted within the meaning of this act of parliament by the two inhabitants, the written demand upon the overseers was sufficient.

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BAYLEY J. (a) I am of opinion that the objection taken at the trial was valid, and that the prosecution, which is the subject of this case, was not carried on by the proper officer. The inhabitants, according to this act of parliament, are not to conduct the prosecution, but that duty is imposed upon the parish constable; and the 7th section of the act imposes a penalty on him if he be wilfully negligent in carrying on the prosecution. It is indeed very important that these prosecutions should be conducted by him, and not by private individuals; for he is a public officer, and it is his duty to obtain, if possible, additional evidence besides that of the two inhabitants, on whose information the prosecution, according to the act of parliament, is originally commenced. It is his duty also to prosecute to conviction, and to call upon the magistrates to inflict punishment. But if the conduct of the prosecution is left with individuals, it may frequently be instituted for the purpose of obtaining the reward, and not with a view to justice; they may forbear to produce all the evidence necessary to shew the full extent of the nuisance; and even after conviction may consent

(a) Lord Ellenborough C. J. was absent.

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to the discharge of the offender without calling upon the Court to pronounce judgment. The danger of any such collusion will in a great degree be removed by our holding it to be necessary that such a prosecution should be conducted by a public officer. I think therefore that that is the sound construction of the act of parliament, and that no claim can be made under it, except where the prosecution has been so conducted; and therefore that the rule for setting aside the nonsuit should be discharged.

ABBOTT J. I am of the same opinion, that the nonsuit was right. The prosecution was not carried on as the act of parliament prescribes; for all that the constable did in this case was to enter into a recognizance, but the prosecution itself was not conducted by him. The demand too was not rightly made; for the notice given to the overseer was, that the prosecution had been carried on by the inhabitants, nothing being said of the constable; which is not sufficient in a case where the party neglecting to comply with the demand incurs a penalty, and where therefore the words of the act of parliament must be strictly complied with.

HOLROYD J. I am of the same opinion, that in this case the prosecution was not carried on as the act of parliament requires. By the act the constable is allowed his reasonable expences, if the prosecution be carried on by him. In fact the overseers may be considered as privy to such prosecution when conducted by their own officer: and they are therefore guilty of a culpable neglect, if under such circumstances they do not pay the reasonable expences and reward prescribed by the act of parliament. But when the prosecution is conducted by
individuals

individuals the case is different, for there the overseers do not depend on their own officer, but only on the information given them by those individuals. I think also that in this case the demand was insufficient, for it only stated that the prosecution had been carried on by the inhabitants. The rule therefore must be discharged.

Rule discharged.

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DOE, on the Demise of the Mayor, Aldermen, Capital Burgesses, and Commonalty of MALDEN, *against* MILLER. *Saturday, June 6th.*

EJECTMENT. The declaration stated a demise by the mayor, aldermen, capital burgesses, and commonalty of *the borough town of Maldon*. At the trial before Wood B., at the last *Lent* assizes for the county of *Essex*, it appeared that the corporation had been a very ancient one, and by the failure of some of its integral parts, had ceased to exist in 1768. The new charter, which was given in evidence, was dated on the 8th *October* 1810, and by it, they were incorporated by the name of the mayor, aldermen, capital burgesses, and commonalty of *Malden*. Upon this it was objected for the defendant, that there were two fatal variances. First, the insertion of the words "*of the borough town*" in the name of the corporation, and secondly, the spelling of the name *Maldon* instead of *Malden*. The learned Judge overruled both objections, but gave the defendant leave to move to enter a nonsuit, if the Court should be of a different opinion.

In ejectment, the demise was laid to be by the mayor, burgesses, &c. of the borough town of *M.*, and on the trial it turned out from the charter that the name of the corporation was, "The Mayor, &c. of *M.*." Held, that this was no variance, it appearing from the charter, which was in evidence, that *M.* was a borough town.

Ballantine

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Ballantine having, in last *Easter* term, obtained a rule nisi to this effect,

Marryatt and *Taddy* now shewed cause. This is not a substantial variance from the name in the charter. It is laid down, *Bacon's Abr. tit. Corporations, c. 2.* that if there be enough said to shew that there is such a corporation, and to distinguish it from all others, the body politic is well named, though the words and syllables are varied from. The case of the borough of *Lynn Regis* is to the same effect. (a) There the true name was Major et burgenses burgi domini regis de *Lynn Regis*; and an obligation made to them by the name of Major et burgenses de *Lynn Regis*, was held to be good: and though the words "burgi domini regis" were left out, it was held to be no substantial variance. So the insertion of other words will not have a different effect, unless the words themselves be material. In *Dunper v. Sims* (b), the words "in the county of *Oxford*" were incorrectly inserted; yet it was held to be of no importance. These cases shew that the question on which the Courts have uniformly decided, has been, whether, the variance be a substantial one or not. It may be said, that these were all cases of grants. But so is the present case also. For the lease on this record must be taken to be a grant, and to have been actually made. Then can there be any distinction between a grant to *John Doe* and any other person? If not, the only question will be, whether this would in other grants be a substantial variance. In the cases

(a) 10 *Coke*, 122.(b) *Cra. El.* 816.

cited,

cited, variations as great have been held to be immaterial. In the case of *Merton College*, the true name was "Gardianus, &c. collegii de *Merton* in universitate *Oxonie*," and in the lease it was only "in *Oxonid*." But, inasmuch as there was no substantial difference between *Oxford* and the university of *Oxford*, it was held good. For from the word *Collegium*, it would be implied, that by the word *Oxford*, the university, and not the city was meant, even supposing them not to be co-extensive. So here, from the words mayor, burgesses, and commonalty of *Malden*, it must be implied that *Malden* is a borough. For otherwise there would not be burgesses. Then if it be a borough, it must also be a town, *Littleton, Tenure in Burgage*. (a) The words borough town of *Malden*, are therefore synonymous with *Malden*, and then there is no substantial variance. They also cited the cases of *The Dean and Chapter of Carlisle* (b), *The Dean and Canons of Windsor* (c), and *The Mayor and Burgesses of Stafford v. Bolton* (d), and *Dr. Ayray's case*. (e) And as to the difference of *Maldon* and *Malden*, that was wholly immaterial, for the words sound exactly alike.

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Onslow Serjt. and Ballantine, contra. The question is, whether the Court will by implication, make out that these two names are the same. A corporation only exists, and can only do corporate acts, by the name given to it by the charter. Here there is a great difference between the two names. And the *Stafford* case proves that such a misdescription is material;

(a) Sect. 164.

(b) 10 Coke, 124.

(c) *Ibid*.

(d) 1 Bos. & Pull. 40.

(e) 11 Coke, 19.

the

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the decision there having proceeded on the sole ground that the misnomer might have been pleaded in abatement. Here, however, no such plea could have been framed, and therefore that case is an authority in favour of the objection. The case of *King's Lynn*, and the other cases cited are those of grants made to or by the respective corporations. It was therefore, not competent for the parties who had made the grants to take advantage of their own mistake, so as to avoid their own acts. But here the grant to *John Doe* is purely fictitious, and the corporation are the real plaintiffs in the suit. And this case substantially falls within the principle laid down by Lord Chief Baron *Gilbert* (a), where he says, "there is a difference between writs, declarations, &c. and obligations and leases; for that if the name of a corporation be mistaken in a writ, a new writ may be purchased of common right; but it were fatal if mistaken in leases and obligations, and the benefits of them would be wholly lost; and therefore one ought to be supported and not the other." Here the corporation may, if they please, bring a fresh ejectment by their proper name, and the benefit to them is not wholly lost by the failure in the present action. And the inconvenience to them is no greater than that to every plaintiff, who having commenced an action by a wrong name, is turned round by a plea in abatement. The defendant in this case, by his plea, in fact denies that he held under the mayor, &c. of the borough town of *Malden*; and at the trial it is proved that he did not do so, but under another and a different corporation. Then this is a fatal variance, and as the party could not have pleaded it in abatement, as

(a) *Gilb. C. B.* 234. cited in *Bess. & Pull.* 40.

he might have done in the *Stafford* case, he ought to have the advantage of it in this stage of the cause. And as to the other objection, it is by no means evident that *Maldon* and *Malden* sound alike.

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BAYLEY J. (a) It seems to me, that in this case there is no variance. It is stated in the declaration, that the mayor, aldermen, capital burgesses, and commonalty of the borough town of *Maldon*, demised to the plaintiff. That is a fact, which if not admitted by the confession of lease, entry, and ouster, would require to be proved. It is however, necessary notwithstanding such confession, to prove the real title to the property to be in them, for otherwise they cannot recover. It is said, that there are no such persons as the mayor, aldermen, capital burgesses, and commonalty of the borough town of *Maldon*; the name in the charter being the mayor, &c. of *Malden*. Now as to the distinction endeavoured to be taken between *Maldon* and *Malden*, it is sufficient to say, that the two words sound alike, and therefore that variance is of no importance. As to the other, viz. the insertion of the words "of the borough town," the distinction is laid down in *Bro. Abr., Misnomer*, 73. quoted in 1 *Bos. and Pull.* 44., where it is said, "in an action by a corporation or a natural body misnomer of one or the other, goes only to the writ, but to say that there is no such person in rerum naturâ, or no such body politic, this is in bar; for if he be misnamed, he may have a new writ by the right name, but if there be no such body politic or other person, then he cannot have an action." Now the name of the corporation in this

(a) Lord Ellenborough C. J. was absent.

declaration

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declaration is, the mayor, &c. of the borough-town of *Malden*, and every borough being a town, the same may be considered as equivalent to the mayor, &c. of the borough of *Malden*. Then if we look into the charter, we find that *Malden*, and the borough of *Malden*, are every where used as synonymous terms. It begins with stating, (page 1, of the printed copy) Whereas the borough of *Malden* is an ancient borough: it then appoints (p. 6.) a mayor of the borough, aldermen of the borough, capital burgesses of the borough, and other officers; and in p. 8. the language is peculiarly strong for this it is said, that the aforesaid mayor, aldermen, capital burgesses, and commonalty of the borough aforesaid, and their successors shall for ever thereafter have one prison in their moot-hall, and one market. There are many other passages in the charter, which show that these two terms, borough of *Malden* and *Malden* are synonymous. If that be so, and the distinction laid down in *Brake* be right, there are in this case persons substantially answering the description in this declaration. It appears, therefore, that the mayor, aldermen, capital burgesses, and commonalty of the borough-town of *Malden*, have the right to the land in question, and if so cadit questio.

ANNOT. J. I am of opinion that there is no variance in this case. The lease passes the interest of the corporation in the land, and the lessee under it has the same right which the body politic had. That is admitted; but it may be said that although the lease is good as against the corporation itself, yet that the party in this case should have declared, that the mayor, &c.

&c. of *Malden* by the name of the mayor, &c. of the borough town of *Malden* made the demise to him. Upon consideration, however, I am satisfied that that was not necessary, and that the plaintiff is entitled to recover. If no such corporation existed as that described in this declaration, then he could not recover. But if there be such a corporation he may. Now it is proved by the charter that the mayor, &c. of *Malden* are in truth the same as the mayor, &c. of the borough (which is synonymous with borough town) of *Malden*. The lease therefore made by the mayor, &c. of the borough town of *Malden*, is substantially a lease made by the mayor, &c. of *Malden*, and is therefore good.

HOLROYD J. I am of the same opinion, that this objection ought not to prevail. It is alledged as a fact in the declaration that the mayor, &c. of the borough town of *Malden* made this demise. If by the confession of lease entry and ouster an admission of that demise had not been made, it would have been necessary to prove it by producing an actual lease. Now, it appears from the charter which is in evidence, that *Malden* is a borough; that there are a mayor, aldermen, and other persons officers of that borough, from which it is evident that there is, in fact, a corporation of the mayor, aldermen, &c. of the borough town of *Malden*, incorporated by the name of the mayor, &c. of *Malden*; then the same persons who are mentioned in the charter, and who are a corporation capable of demising, have made this demise, and it appears that they are entitled to the land.

Rule discharged.

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1818.

*Mining,
Year 1818.*

CHEESMAN against HARDHAM.

An averment (in a declaration for disturbing the plaintiff's right of common), that plaintiff was entitled to common of pasture for all his cattle levant and couchant upon his land, is well supported by evidence that the plaintiff was a part-owner with defendant and others of a common field, upon which, after the corn was reaped and the field cleared, the custom was for the different occupiers to turn out in common their cattle: the number being in proportion to the extent of their respective lands within the common field; although such cattle were not maintained upon such land during the winter; and although the custom proved was to turn out in proportion to the extent and not to the produce of the land, in respect of which the right was claimed: Held also, that it was not necessary to state his right to be with the exception of his own land, but that it was well laid to be over the whole common.

ACTION for a disturbance of the plaintiff's right of common. The declaration stated, that the plaintiff was, at the time of the grievance, lawfully possessed of divers, to wit, 100 acres of land, and the appurtenances, situate and being in a certain open and common field called *Brooks*, in the parish of *Bosham*, in the county of *Sussex*, and by reason thereof during all the time aforesaid of right ought to have had, and still of right ought to have common of pasture for all his reasonable cattle, levant and couchant, in and upon, his said land, with the appurtenances in and over the whole of the said common field called *Brooks*, situate in the said parish of *Bosham*, in the county aforesaid, every year when the said field is sown with any kind of corn, after the said corn in the said field is reaped, gathered, and carried away, until the said field, or some part thereof, should be sown again with some kind of corn, as belonging and appertaining to his said land, with the appurtenances. At the trial before *Wood B.* at the last *Lent* assizes for the county of *Sussex*, it appeared in evidence that the common field called *Brooks* contained about 111 acres of arable land, of which the plaintiff owned and occupied about 30, and the defendant only one acre, the remainder of the field being the property and in the occupation of other individuals. The lands of all the proprietors lay dispersed in different parts of

the

the field, and the custom was proved to be that after the corn was reaped and the field cleared, the occupiers of the different lands therein turned out their cattle in common; the numbers which each individual was entitled to turn out, being respectively in proportion to the extent of his land, within the common field. The action was brought; in consequence of the defendant having turned out greatly more than the number to which he was under this custom entitled. A verdict having been obtained by the plaintiff, the defendant having liberty to move to enter a nonsuit, a rule nisi was accordingly obtained last term on two grounds: first, that in the right of common claimed by the plaintiff there was no exception of his own land; and secondly, that plaintiff's cattle could not be said to be levant and couchant upon his land rather than upon any other part of the common field; and therefore that the evidence did not support the right stated in the declaration; against which rule cause was shown on a former day by

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Laves and Curwood. It was not necessary to state the right with the exception of the plaintiff's own land. For the law excepts it, and it is stated in the declaration that the plaintiff has land in the common field. [They were then stopped by the Court on this part of the case.] As to the second point, it is not requisite that there should be land on which the cattle might actually during the whole year be kept, for levancy and couchancy is only a mode by which the different rights of common are admeasured and apportioned. And it is so laid down by Lord *Kenyon* in *Scholes v. Hargreaves*. (a) In *Bogers v. Bonstead* (b) it was held sufficient to establish such a claim that the cattle were foddered with the

(a) 5 T. R. 48.

(b) 1 Selw. N. P. 413. 4th edit.

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produce of the land in respect of which the right was claimed. In this case it appears that the number of cattle turned out is in proportion to the quantity of land, which is a mode of admeasurement of the common, exactly similar to levancy and couchancy, the number of cattle which the land will maintain being naturally in proportion to the extent of the land itself. There is therefore no material difference between the right proved and that stated in the declaration.

Marryat and D'Oyley contra. The cattle, as it appears from the evidence, are never upon the land except when they are turned out to enjoy the right of common. There is therefore no reason to say that they are levant and couchant on the plaintiff's land, rather than on that of any other proprietor in the field; and yet the right is claimed in respect of a particular levancy and couchancy on the plaintiff's land. In *Scholes v. Haugreaves* (a), Buller J. lays it down, that "levancy and couchancy means the possession of such land as will keep the cattle (claimed to be commoned) during the winter; and as many as the land will maintain during the winter shall be said to be levant and couchant." There must therefore be some other land (besides the common itself) in respect of which this right of common must be claimed, and the quantity of that land must be such as will maintain the cattle during the winter. Here, however, there is no such land: for during the winter the plaintiff must keep the cattle, if he keeps any at all, in land wholly unconnected with the common field. But even if levancy and couchancy be taken to be only a mode of apportioning the com-

(a) 5 T. R. 48.

mon, it will not do. For at all events the number of cattle must be in proportion to the number which the lands will maintain; or, in other words, in proportion to their produce. But the custom proved here is for the parties to turn on not in proportion to the produce, but according to the extent of their respective lands. That therefore is a material difference, and the evidence does not support the declaration.

Cur. adv. vult.

BAYLEY J. (a) now delivered the opinion of the Court. The plaintiff in this case has declared that he was lawfully possessed of divers, to wit, 100 acres of land, with the appurtenances, situate in a certain common field called *Brooks*, and that by reason thereof he had common of pasture for all his commonable cattle, levant and couchant, in and upon his said land, with the appurtenances, in and over the whole of the said common field, every year, when the said field was sown with any kind of corn, after the said corn in the said field was reaped, gathered, and carried away, until the said field, or some part thereof, was sown again with some kind of corn; and the question is, whether this right of common has been correctly described in the declaration, and supported by the evidence. It was objected, that as this was arable land situate in a common field, the cattle could not be properly said to be levant and couchant *on the said land*, inasmuch as they wandered over the whole extent, and might with equal propriety be said to be levant and couchant on any other part of the common field. This therefore brings it to

(a) Lord Ellenborough C. J. was absent when the case was argued.

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against
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the question, what is the meaning of the term levancy and couchancy as used in this declaration with reference to a right of common? In the case of a distress those cattle only are said to be levant and couchant on the land, which have been there for a space of time long enough for them to have lain down and risen up again. But in a case of a right of common it is different, for there it means cattle which are connected with the land in respect of which common is claimed; and is a mode of ascertaining the number of cattle which are entitled to the right of common. The right of common appendant is confined to arable land only, and yet the party must state in claiming this right, that the cattle were levant and couchant upon the land. It follows therefore that arable land in point of law may have cattle levant and couchant thereon. In *Bennett v. Reese* (a) the prescriptive claim of common appendant did not state that the cattle were levant and couchant, and the defendants there having replied that the cattle were not levant and couchant, the question was, whether that replication put a material fact in issue. Now if levancy and couchancy were incident to the right of common appendant, the replication was a good answer to the plaintiff's claim, and the Court held it so to be; and in *Brooke's Abr.* tit. *Common*, pl. 8, it is also laid down, that in the case of common appendant you must state the cattle to be levant and couchant upon the estate. The right stated in this case is not, properly speaking, that of common appendant, but is most like the right of common stated in *Sir Miles Corbett's case* (b), and there called common of shack, which is a right of

(a) *Willcs*, 227.(b) 2 *Coke*, 65.

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persons occupying arable land lying together, and uninclosed, to turn out their cattle to feed promiscuously in the open field. If there were no common right of this sort, every man would be bound to keep his cattle upon his own land, which would be productive of great inconvenience, and in many instances would be impossible. In order to obviate this, every man's cattle are allowed the full range of the whole field; but then the number which each man is at liberty to turn out must be limited by some rule. This introduces levancy and couchancy, by which the number of cattle to be turned out is restrained to that which the land of each individual is capable of supporting. So in the case of common appendant the right is confined to such cattle as are levant and couchant upon the estate, viz. to such and so many as the tenant has occasion for to plough and manure his land; and in 1 *Ventr.* 54. 2 *Kettle*, 590. *Noy*, 30. and 5 *T. R.* 48. it is settled that what is meant by cattle levant and couchant, is the number of cattle which the land in respect of which the common is claimed will maintain; and in the latter case Lord *Kenyon* says, that levancy and couchancy is a mode of admeasuring the common. In the case cited from 1 *Salm. N. P.* 413. the question was as to cattle levant and couchant on a messuage and one acre of land. Now within one sense of the words levant and couchant they were so, for they might have been distrained; but the case there was held to be different with respect to a right of common; for Lord *Raymond* says, "These cows cannot be levant and couchant upon the one acre, for I am clear that levancy and couchancy is a stint of common in contradistinction to common sans nombre, and signifies only so many as the messuage or farm will

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by its produce maintain; and it was so resolved in the case of the town of *Derby*. I know there are cases which say that foddering in a yard makes levancy and couchancy, but then the meaning is, foddering with stubble, &c. produced from the messuage or land itself to which the yard belongs." That case therefore shews that the fair meaning of the words, *cattle levant and couchant*, is, the number of cattle which the land is capable of maintaining. In the present case each man under these words would be entitled to put upon the common the number of cattle which his land is capable of supporting: and then the right is not improperly described in the declaration, and has been supported by the evidence. The rule therefore for setting aside this verdict must be discharged.

Rule discharged.

BAYLEY J. afterwards added, There is a passage in *Comyn's Digest*, tit. *Common*, B. which is incorrect. The passage is this: "If several freeholders who have lands in a common field intercommon, one of them cannot prescribe to inclose against the others." Now this is contrary to 7 *Coke*, 65. But the true decision is to be found in 2 *Mod.* 105. where it is laid down, "Where there are several freeholders who have right of common in a common field, such a custom to inclose is good, because the remedy is reciprocal; for as one may inclose, so may another. But Justice *Atkins* doubted much of the case at bar, because the defendant had pleaded this custom to inclose in bar to a freeholder who had no land in the common field where he claimed right of common, but prescribes to have such right there as appendant to two acres of land which he had *alibi*."

This

This decision is not at variance with 7 Coke, 65., and is desirable to correct the error in Lord Chief Baron *Compt's* excellent book.

1818.

W. W. W.
CHESMAN
MAGNET
HARDHAM.

Don, on the Demise of ABRAHAM SMITH the Younger and JANE his Wife against SAMUEL WESSON and WILLIAM STONE.

Monday,
June 8th.

EJECTMENT to recover the possession of certain lands in the parish of *Exton* in the county of *Somerset*. The declaration contained one demise on the 2d day of April 17 from *Abraham Smith the younger and Jane his wife*. The defendants pleaded not guilty upon which issue was joined. The cause came on to be tried at the last *Summer assizes* for the county of *Somerset* before Mr. Justice *Burrough*, when a verdict was found for the plaintiff, subject to the opinion of the Court upon the following case:

Mary Corring late of the parish of *Exton* in the county of *Somerset*, spinster, being seized in fee of the premises in question in this cause, made her last will and testament in writing dated the 10th day of *March* 1803, duly executed and attested as is by law required for the passing real estates, by which she demised as follows, viz. I do also give, devise and bequeath all my freehold messuages, lands, tenements, and hereditaments, and real estate whatsoever and wheresoever, with their and every of their rights, members, and appurtenances, and all the rest, residue and remainder of my goods, chattels, and personal estate and effects of what nature or kind soever, subject and chargeable with the

Devise to *M. H.*, her heirs, &c. for ever; and in case *M. H.* shall happen to die and leave no child or children, then to *J. B.* and her heirs for ever, paying the sum of 1000*l.* to the executor or executors of *M. H.*, or to such person as *M. H.* by her will shall appoint: Held, that the words "child or children" were here synonymous with "issue," and that this was not the devise of an estate tail to *M. H.*, but of an estate in fee to *M. H.* with a good executory devise over to *J. B.* in case *M. H.* died leaving no issue living at her death.

payment

1818.

Des.
equus
Wesars.

payment of all my just debts and legacies, and funeral charges and expences, unto my niece *Mary Hiles*, her heirs, executors, administrators, or assigns for ever. And my will is, that in case my niece *Mary Hiles* shall happen to die and leave no child or children, then my will is, I give, devise, and bequeath unto my niece *Jane Barnes* all my freshold lands and tenements called or known by the name of *Witheridge* and *South Hockham* to her and her heirs, for ever, paying the sum of one thousand pounds of lawful money of Great Britain unto the executor or executors of my niece *Mary Hiles*, or to such person as she, by her last will and testament, shall direct." The premises so demised to *Jane Barnes* are the premises in question in this cause. The said *Mary Cording* afterwards died on the 10th day of *January* 1809, seized of the premises in question in this cause without having altered or revoked her said will. Upon her death the said *Mary Hiles* entered into the premises, and in *Hilary* term 1812. suffered a recovery thereof, the uses of which recovery were by indentures of lease and release bearing date respectively on the 9th and 10th days of *September* 1811, and made in contemplation of her intended marriage with the defendant *William Stone*, declared to be to the use of the said *Mary Hiles* until the marriage, and then to the use of certain trustees therein named in fee, in trust for such persons, &c. as the said *Mary Hiles* should by deed or will direct, and in default thereof, and in the mean time, to permit her to receive the rents during her life. After her death to permit the husband to receive them during his life, and then to convey the same to the children of the marriage as therein mentioned, and if no children, to the survivor in fee. The marriage

marriage soon afterwards took effect, and the said *Mary Hiles* then *Mary Stone* died on the 1st day of *January* 1817, without having had any child, and having by her will made in pursuance of the power contained in the settlement, devised the premises to her husband the said *William Stone*, who survived her, and he and the said *Samuel Webber* as his tenant continually since her death, have been and still are in possession of the premises. The said *Jane Barnes* the devisee in remainder on the 8th day of *September* 1808, intermarried with *Abraham Smith* the younger. They are both living and are the lessors of the plaintiff in this ejectment.

This case was argued in last *Hilary* term by

1818.

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argued
Wentworth.

Gasdee, for the lessors of the plaintiff. The question is, whether by the will of *Mary Cording*, her niece *Mary Hiles* took an estate in fee with an executory devise over to *Jane Barnes*, or an estate tail. If she took the latter, then the limitation over to *Jane Barnes* is barred by the recovery which has been suffered. If the former, the lessors of the plaintiff are entitled to recover. The devise is in this case of the estate to *Mary Hiles* in fee, "and if she happens to die, leaving no child or children," then to *Jane Barnes*. And the first question will be whether by these words, "leaving no child or children," the testatrix meant leaving no children living at the time of *Mary Hiles*'s death, or an indefinite failure of her issue. Now the words child or children, ordinarily mean the immediate descendants of a person, as contradistinguished from issue, which would include his more remote offspring. But even the words "leaving no issue," have been construed to mean "leaving no issue at the time of the

1818.

Dea.
WEDDER.

the death;" in cases where, from the other circumstances of the will," it appeared to be the testator's intention to use them in that sense. In *Pells v. Brown* (a), the circumstance relied on by the Court was the expression "if he died without issue, living *William* his brother." In *Porter v. Bradley* (b), Lord *Kenyon* founds his judgment on the words "leaving no issue behind him," and on the testator's mentioning the event as likely to happen in the life-time of his widow or younger son or daughters; and in *Roe on the Demise of Sheers v. Jeffery* (c), he proceeded upon the fact of the testator's having given life-estates only to his granddaughters after the death of his grandson without issue. These cases shew the principle on which the Courts have uniformly proceeded. And the same rule is laid down in *Barlow v. Saller*. (d) Now there are several circumstances in the present will, from which this appears to have been the intention of the testatrix. For she uses the words "child or children," and not "issue;" she gives a power to *Mary Hiles* of devising 1000*l.* in case of her dying without children, and directs also *Jane Barnes* to pay that sum to the executor or the devisee of *Mary Hiles*. All which circumstances clearly shew that the testatrix intended that the estate should go over immediately to her niece *Jane Barnes*, on the death of *Mary Hiles*, if the latter died without leaving a child living at her decease. The executory devise over therefore is not too remote. And as to the second question whether this devise be an estate tail, the cases already cited clearly shew that it cannot so be considered. The lessors of the plaintiff are therefore

(a) *Cro. Jac.* 590.(b) 3 *T. R.* 146.(c) 7 *T. R.* 589.(d) 17 *Fen. jms.* 479.

entitled to recover, this being not an estate tail, but a good executory devise of the estate to them upon a contingency which has happened.

1819.

Do
not
write

Moore, contra. The words "child or children," are in this case, synonymous with issue, for *Mary Hiles*, at the time of the death of the testatrix, was not married, and it was laid down in *Wild's case* (a), and in *Hughes v. Sawyer* (b), that children unborn, were to be taken in a will as synonymous with issue. So also it was held in *Davie v. Stevens*. (c) And in *Bisfield's case*, cited by Lord Hale in *King v. Melling* (d), the word "son" was taken as nomen collectivum, and to include all the male issue. Then the word "child" which is larger, will include all issue. For if the strict and ordinary acceptation of the word child, were adopted, there would follow this consequence, that if *Mary Hiles* had a child which died in her life time, leaving a child, then *Jane Barnes* would succeed on the death of *Mary Hiles* in preference to the grandchild, and this, though the leading object of the testatrix obviously, was to give the estate to *Jane Barnes* only on the failure of the line of *Mary Hiles*. The will must be therefore read as if the testatrix had used the words "and if my niece *Mary Hiles* shall happen to die, leaving no issue." Then no authority can be cited, where the words "leaving no issue" in the case of a real estate, are construed to mean, leaving no issue living at the time of the death of the first taker. There is a distinction taken in *Forth v. Chapman* (e).

(a) 6 Coke, 17. b.

(b) 1 P. Wms. 534.

(c) 1 Doug. 321.

(d) 1 Fentr. 231.

(e) 1 P. Wms. 663.

between

1813.

Do
Against
WARRER.

between these words as applied to personality and realty, which was admitted by Lord Knyton in *Ex dem. Sheers v. Jeffery*, and is confirmed by Lord Eldon in *Crooke v. De Vandes*. (a) But in the case of real property, these words have always meant an indefinite failure of issue. In some of the cases cited, as *Pells v. Brown*, *Porter v. Bradley*, and *Ex dem. Sheers v. Jeffery*, there have been found strong circumstances to control this construction. But without such circumstances the construction must prevail. In *Tenny v. Agar* (b), it is so laid down expressly by *Le Blanc J.* who says "there is no case where the words die without leaving issue simply have been adjudged to mean, without leaving issue at the time of the death." Then, what are the circumstances relied on here? The use of the words child or children, has been already shewn to mean, issue generally, and the mere circumstances of the power of disposing of 1000*l.* by will, and of the payment to the executor of *Mary Hiles*, are too weak to alter the case. Doubtless, the word "executor" does not necessarily mean the immediate executor, for the executor of that executor, would in point of law, be the executor of *Mary Hiles*. This case cannot be distinguished from *Wentley on the demise of Manley v. Bouville*. (c) There the devise was in fee to *Thomas Manley*, the nephew of the testator, and if he died without children lawfully begotten, then to his sisters the nieces of the testator, and if they died and had no children, then to the lesser of the plaintiff. And there as here, the word

(a) 98*l.* Jan. 1803. 13*l.* 1803. (b) 14*l.* 1803.

(c) *Col. temp. Hardw. 258.*

children

children was used and not issue. Yet Lord Hardwicke held, that this was an estate tail, and that the lessor of the plaintiff was barred by the recovery suffered by the niece. That case therefore is similar to the present, and shews that the lessors of the plaintiff are also barred by the recovery suffered in this case. Either therefore *Mary Hiles* under the will took, as in the last case, an estate tail, or if not, still at all events the executory devise over to *Jane Barnes*, is bad, as being too remote, being to take effect only after an indefinite failure of the issue of *Mary Hiles*. In either event, the judgment must be for the defendant.

Cur. adv. vult.

Lord ELENBOROUGH C. J. now delivered the judgment of the Court.

The questions in this case arise upon the will of *Mary Conling*, spinster, whereby she devised all her real estate, and all the residue of her personal estate, unto her niece *Mary Hiles*, her heirs, executors, administrators, or assigns for ever. And in case her niece, *Mary Hiles*, should happen to die and leave no child or children, then testatrix gave unto her testatrix's niece, *Jane Barnes*, all her freehold tenements called *Witheridge* and *South Hackham*, to her and her heirs for ever, paying 1000*l.* unto the executor or executors of *Mary Hiles*, or to such person as she by her last will should direct. *Mary Hiles*, after the testatrix's death, having suffered a recovery, and having afterwards died without having had any child, this ejectment was brought by *Jane Barnes* and *Abraham Smith*, her husband, the lessors of the plaintiff, to recover the premises devised

1818.

Dox
against
Withers.

1818.

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Doe
against
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devised over as aforesaid. In this case it has been contended that the words "child or children" mean issue; and that the first devise is therefore either converted into an estate tail by the limitation over on *Mary Hiles's* dying and leaving no child or children, in which case the limitation over is a remainder, and barred by the recovery. Or if the first devise be considered to be in fee, that the limitation over is too remote, as being an executory devise to take effect after an indefinite failure of issue. It is true that the words "child or children" may mean issue. And where the intent requires it, the word "children" has not been confined to the immediate descendants, though that is its ordinary and proper sense, but has been extended to all the descendants, whether mediate or immediate, as in *Wild's* case, 6 Co. 17. a. *Royle v. Hamilton*, 4 Ves. 437. *Doe v. Cavendish*, 4 T. R. 741. n. and in *Ratcliffe v. Buckley*, 10 Ves. jun. 201. The same construction was also given to it by Lord Hardwicke even in a deed, according to the intent of the parties, in *Wyth v. Blackman*, 1 Ves. 200. S. C. Amb. 555. And in the present case the words "child or children" must be construed to mean "issue," because it is the manifest intention of the testatrix that *Jane Barnes* should not take by the devise over in exclusion of any of the issue, however remote, of *Mary Hiles*; and unless the words do receive that construction, *Jane Barnes* would take in exclusion of such issue, in the event of *Mary Hiles* dying without leaving at her death any son or daughter surviving her, but leaving a grand-child or grand-children, the offspring of any of her own deceased immediate children. Taking therefore the will as if the devise over had been "in case *Mary Hiles* should

should die and leave no issue," this is the effect of the will. It contains first a devise to *Mary Hiles* in fee, which would enable her to dispose of the fee amongst her offspring, if she should leave any at her death; but if she should not leave any, then instead of the fee in the two tenements devised over on the happening of that event, and which upon that event are given to *Jane Barnes* and her heirs, the sum of 1000*l.* was to be paid by *Jane Barnes* or her heirs, to the executors or nominees of *Mary Hiles*. This is therefore like the case of *Roe v. Jeffery*, 7 T. R. 589., which was a devise to *J. F.* and to his heirs for ever, but in case *J. F.* should depart this life, and leave no issue, then the testator devised over estates for life only. In that case, the first devise was held to be in fee, and not in tail, and the limitation over a good executory devise, upon the event of a failure of issue at the time of his death, for Lord *Kenyon* says, "the persons to whom it was given over were then in existence, and life estates only were given to them." The payment of 1000*l.* in the present case, is equally strong in that respect, it being a personal provision, and being to be made to a person or persons appointed by *Mary Hiles* in her will, the event contemplated by the testatrix, seems to have been approximate, and not a remote event, namely, a failure of children or issue at *Mary Hiles's* death, and not an indefinite failure of issue, which might happen at any remote period; and *Mary Hiles* never having had any child, the event has happened on which those two tenements were given over to *Jane Barnes*. And if the event on which the two tenements named in the will are given over be, as we think it is, to be confined to a failure of issue

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at *Mary Hiles's* death, not only the above case of *Roe v. Jeffery*, but also the cases of *Porter v. Bradley*, 3 *Term Reports* 143., and *Doe on demise of Barnfield v. Wetton*, 2 *Bos. & Pull.* 324., are directly applicable to the present case, to shew that the prior estate in fee given to *Mary Hiles*, is not by the limitation over, upon the failure of her issue at the time of her death, narrowed into an estate tail. And as two tenements only are given over on that event, that is an additional circumstance to shew that the devise over cannot be considered as converting the prior devise into an estate tail, as that would make the same words of devise operate, as giving to *Mary Hiles* two different estates, an estate tail in part, and an estate in fee in the residue. We think therefore, that the first devise gave a fee, and that the devise over is an executory devise, and not too remote. Consequently, that it is not barred by the recovery, and that judgment must be for the plaintiff.

Judgment for the Plaintiff.

—see *Snelling v. Lord Huntingfield* 1 C. M. & A. 20

Monday,
June 8th.

BRACEGIRDLE against HEALD.

A contract for a year's service, to commence at a subsequent day, being a contract not to be performed within the year, is within the fourth section of the statute of frauds, and must be in writing; and therefore no

action can be maintained for the breach of a verbal contract made on the 27th *May*, for a year's service to commence on the 30th of *June* following.

THE declaration stated, that in consideration that the plaintiff, at request of the defendant, on the 27th *May*, had made an agreement to enter into defendant's service as groom and gardener, and to come into his service on the 30th *June* then next, to serve defendant for twelve months upon the terms therein mentioned, defendant promised to receive and take plaintiff, and to retain and employ him in such service for

the

the time, and upon the terms aforesaid: Breach, that although plaintiff was willing to enter into the service on the 30th *June*, and requested the defendant to receive him, yet that the defendant refused to receive plaintiff into his service. To plaintiff's damage of 20*l*. Plea, non-assumpsit. At the trial at the last assizes for the county of *Chester*, a verbal contract similar to that stated in the declaration was proved to have been made on the 27th day of *May* between the parties, by which the defendant agreed to take the plaintiff into his service for a year, to commence on the 30th *June* following. It was further proved that the plaintiff on that day tendered himself as servant to the defendant, but that the latter had refused to receive him. It was objected, that as the plaintiff was not to enter into the service until the 30th *June*, and as the service was to continue for one year from that day, the contract could not be performed within a year from the time when it was made, (27th *May*), and that therefore by the 4th section of the statute of frauds, the contract not being in writing, no action could be maintained upon it. The case of *Boydell v. Drummond* (a) was relied on, and the learned Judges upon that authority thought the case within the statute, and nonsuited the plaintiff. A rule nisi for setting aside this nonsuit having been obtained in *Easter* term,

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Cross and *D. F. Jones* now shewed cause. This action is founded upon a contract made on the 27th *May* for a service to commence from the 30th *June*, and to continue for twelve months then next following. The

(a) 11 *East*, 142.

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contract, therefore, would not be completed until the 30th day of *June* in the following year, which is more than one year from the making of it, and therefore this case falls expressly within the words of the statute of frauds. It is said indeed that there may be a partial performance of this contract within the year by the entering into the service: but the case of *Boydell v. Drummond* (a) is an express authority to shew that a complete performance within the year is what is requisite, and that such a case as the present is within the fourth section of the act. And this case is clearly distinguishable from that of *Fenton v. Emblers* (b); for there the contract might, on a particular event happening, have been concluded within a year. But here, from the very terms of the contract, it appears that it must last for more than twelve months.

J. Williams and *G. R. Cross*, contra. It is strange, that though there must have been a great number of cases of this sort occurring since 29 *Car. 2.* was passed, that this objection should never have been made before. And that is a strong argument against its validity. If indeed the contract had been to enter into the service after more than a year from the making of it, it would clearly have been within the words and meaning of the 4th section of the act. But here the commencement of the service is within a month, and the refusal, which is the gist of the present action, takes place then. It is clearly not necessary in all cases where some one term specified in a contract happens to exceed a year, that the whole contract should be in writing. For if a man

(a) 11 *East*, 142. (b) 3 *Burr.* 1278. and also in 1 *Blackst.* 353.

bargains for goods to be delivered within the year, and that the payment shall not be made till after more than a year from the bargain has elapsed, it is not necessary in such a case that the contract should be in writing. For, as Lord *Ellenborough* says, in *Boydell v. Drummond*, "in that case the delivery of the goods which is supposed to be made within the year would be a complete execution of the contract on the one part, and the question of consideration only would be reserved to a future period." So here, the party tenders himself to serve, which is all he can do; and this being so, it must be considered as a complete performance by him of his contract so as to enable him to maintain this action. If contracts of this sort are void for not being in writing, it is strange that such a point should never have been made in the great variety of sessions cases which depend on contracts of hiring and service. Besides, the policy of the statute does not apply to such a case; for the object of the legislature was to repress perjury, and the danger to be guarded against was the setting up of supposititious contracts by the imperfect recollection of witnesses, or by perjured testimony, *after the lapse of a year*; that is the period when the protection of the statute is to commence. It never was intended to extend to a case where a breach must be committed within the year. This seems to have been the general understanding of the statute, and the usage of mankind has been consistent with it. But even on the authority of *Fenton v. Emblers*, this rule may be supported. For there it is expressly laid down, that a general contract, uncertain in its duration, or one which becomes so by the insertion of some term which may put an end to it at any time, is not

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within the statute. Now here there is necessarily implied one which is uncertain. For the continuance of the service by the plaintiff depends on the continuance of his life. And that term "if he shall so long live," must be considered therefore as inserted in the contract. If it had been so expressed, it would clearly have been within *Fenton v. Emblers*; but that which is necessarily implied, needs not to be expressed. This case, therefore, at all events falls within that authority, and this rule must be absolute.

LORD ELLENBOROUGH C. J. This case falls expressly within the authority of *Boydell v. Drummond*, and if we were to hold that a case which extended one minute beyond the time pointed out by the statute, did not fall within its prohibition, I do not see where we should stop; for in point of reason, an excess of twenty years will equally not be within the act. Such difficulties rather turn upon the policy, than upon the construction of the statute. If a party does not reduce his contract into writing, he runs the risk of its not being valid in law; for the legislature has declared in clear and intelligible terms, that every agreement that is not to be performed within the space of one year from the making thereof, shall be in writing. That brings it to the question, what is the meaning of the word performed? will an inchoate performance, or a part execution satisfy the terms of the statute? I am of opinion that it will not, and that there must be a full effective and complete performance. That not being so here, this case falls within the fourth section of the statute, and the nonsuit was therefore right.

BAYLEY

BAYLEY J. I cannot distinguish this case from that of *Boydell v. Drummond*, which I think was rightly decided. The word performance, as used in this statute, must mean a complete and not a partial performance, and if so, this case falls within the fourth section of the statute of frauds. Our decision will not raise those points in settlement law, which have been suggested. For the statute does not say that such agreement will be void as a hiring, but only that no action shall be maintained upon it; such a hiring, therefore, although not in writing, will be quite sufficient for the purpose of acquiring a settlement.

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ABBOTT J. I am of the same opinion. This falls within the case of *Boydell v. Drummond*, which I think, was decided according to the sound construction of the statute of frauds. The case put in argument, of an agreement for goods to be delivered by one party in six months, and to be paid for in eighteen months, being after more than a year has elapsed, is distinguishable on this ground, that there, all that is on one side to be performed, viz. the delivery of the goods, is to be done within a year; whereas here, the service, which is the thing to be performed by the plaintiff, cannot possibly be completed within that period.

HOLROYD J. I think *Boydell v. Drummond* properly decided, and that this case falls within the rule there laid down.

Rule discharged.

REGULA GENERALIS.

Monday next after three weeks of the *Holy Trinity* in the Fifty-eighth year of King *George the Third*.

KING'S BENCH PRISON. Whereas for the better government and preservation of good order in the King's Bench prison, it is expedient to extend the rule made the 19th day of *May* 1760, by this Court, to the cases hereafter mentioned. It is therefore ordered, that from and after the last day of this term, if any prisoner or prisoners in custody of the Marshal of the said prison, shall without the leave of the said Marshal, for that purpose first had and obtained, keep or have any spirituous liquors in the said prison, it shall be lawful for the Marshal of the said prison, to remove such prisoner or prisoners so offending, or any of them to the gaol for the county of *Surrey* in the borough of *Southwark*, or to the prison of the *Marshalsea* there, or to the *Bridewell* within the said borough, at the discretion of the said Marshal, for such time as the said Marshal shall adjudge and think adequate to the offence or offences for which such prisoner or prisoners shall be so removed as aforesaid, not exceeding the space of one calendar month, for the first offence; and if any of the said prisoners shall offend a second time, that then it shall and may be lawful for the said Marshal to remove such prisoner or prisoners so offending, or any of them, to any of the above mentioned prisons, at the discretion of the said Marshal, for such time as the
said

said Marshal shall adjudge and think adequate for the same offence or offences not exceeding the space of three calendar months; and that this rule, together with the former rules and orders of this Court, made for the government of the said prison, be fixed up in the most public place thereof, for the use and inspection of the prisoners therein.

ELLENBOROUGH.

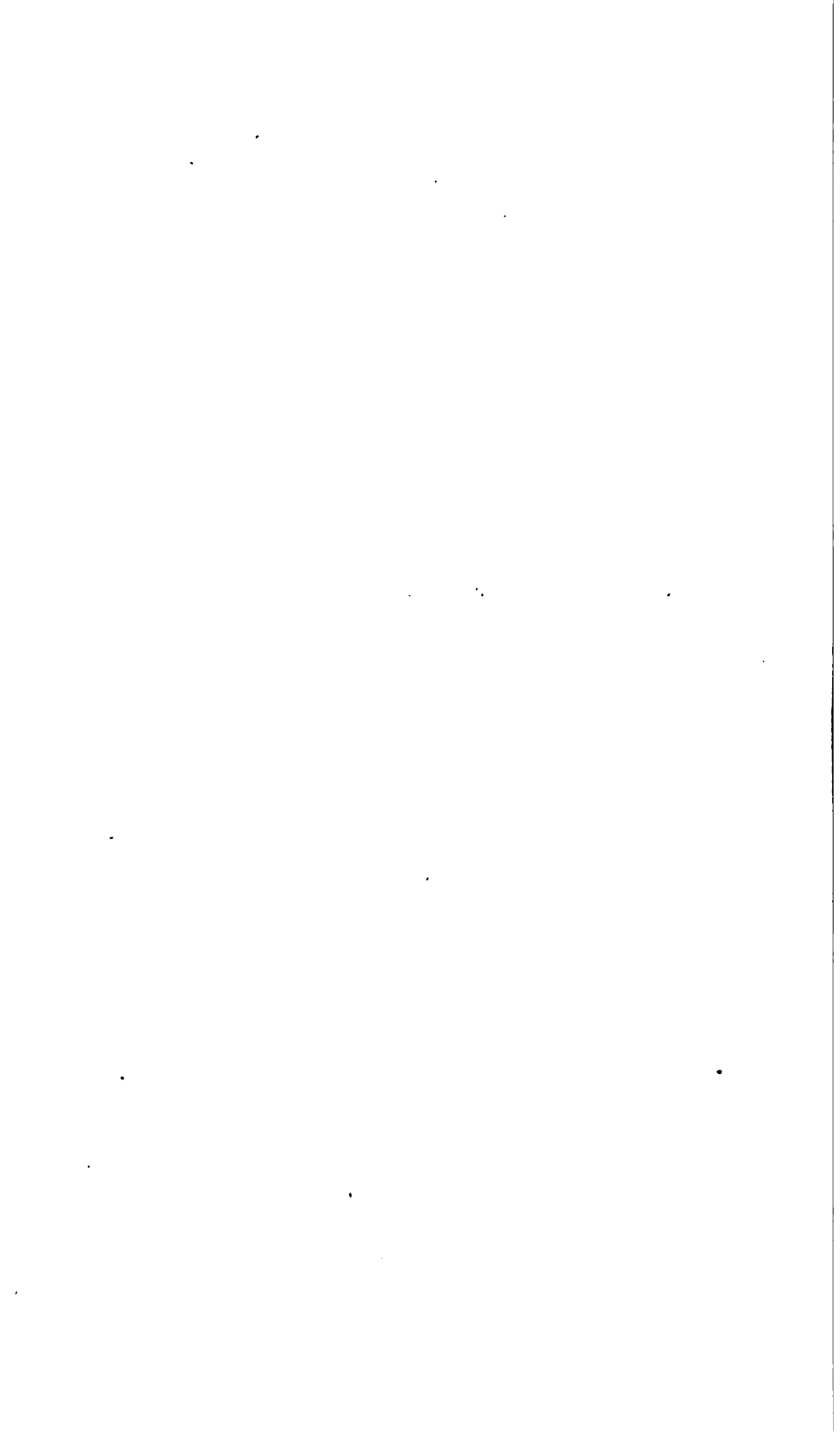
J. BAYLEY.

C. ABBOTT.

G. S. HOLROYD.

On the last day of this term, *William Taddy*, of the *Inner Temple*, was called Serjeant, and gave rings with the motto "*Mos et lex*."

END OF TRINITY TERM.



AN

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TO THE

PRINCIPAL MATTERS.

ACTION ON THE CASE.

1. *A.* SENDS his horse, for the night, to *B.*, who turns it out after dark into his pasture-field, adjoining to and separated from a field of *C.* by a fence, which *C.* was bound to repair; the horse, from the bad state of the fence, falls from one field into the other, and is killed: Held, that *B.* though a gratuitous bailee, might maintain an action against *C.*, and recover the value of the horse. *Rooth v. Wilson*, *M.* 58 G. 3.

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2. In an action on the stat. 52 G. 3. c. 130. to recover the value of premises feloniously destroyed, brought against the hundred by several partners in trade, three of whom were present when the fact was committed, one only gave in his examination upon oath, without stating that to the best of his belief the others had no knowledge of the person who committed the fact: Held, that that was not sufficient. *Nesham and Others v. Armstrong and Others*, *M.* 58 G. 3.

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3. The occupier of a mill may main-

tain an action for forcing back water and injuring his mill, although he has not enjoyed it precisely in the same state for 20 years; and therefore it was holden to be no defence to such an action that the occupier had, within a few years, erected in his mill a wheel of different dimensions, but requiring less water than the old one, although the declaration stated the plaintiff to be possessed of a mill, without alleging it to be an ancient mill. *Saunders v. Newman*, *H.* 58 G. 3.

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4. Where the leader of a mob, having entered a gunsmith's shop and demanded arms, was detained, and the mob then declared that unless he were released they would pull the house down, and they did enter and break the windows, window-frames, &c. and for that purpose used some of the arms found in the shop, and carried away others: Held, that this was evidence of a purpose to demolish the house, and that the owner might recover against the hundred a reparation in damages for the injury done to the house itself; and

and to the arms actually used in the act of demolishing; but that he was not entitled to recover for the value of the arms carried away, that being a substantive and distinct felony, and therefore not within the stat. 1 G. 2. st. 2. c. 5. *Beckwith v. Wood*, E. 58 G. 3. Page 487

APPEAL.

Where an order of removal was served on the appellant parish on *Saturday*, and the sessions were holden on the following *Tuesday*, and the appellant parish was thirty-seven miles from the place where the sessions were holden, but there was no appeal to those sessions, and the justices refused to receive the appeal at the next sessions, the Court granted a mandamus. *The King v. The Justices of Essex*, M. 58 G. 3. 210

APPEAL, NOTICE OF.

1. In an appeal against an inclosure of a highway, by virtue of a writ of ad quod damnum, the notices required by the 55 G. 3. c. 68. must be given, and a notice to the party interested is not alone sufficient. *The King v. The Justices of Essex*, H. 58 G. 3. 373.
- 2 An inclosure act gave to the party aggrieved a right of appeal for any thing done in pursuance of that act, or of the recited (general inclosure) act, on giving to the commissioner and to the parties concerned, ten days' notice in writing. Notice of appeal against an order ascertaining the boundaries between two townships, was served on the commissioner, but not on the lady of the manor, who was a party materially concerned in the question: Held, that the notice was insufficient; although the general inclosure act authorized the

commissioner to ascertain the boundaries between the several parishes, and gave a right of appeal on giving notice to the commissioner only. *The King v. The Justices of Lancashire*, T. 58 G. 3. Page 630

3. By a local act, the management of the poor of a town was vested in certain persons, who were empowered to make rates, and an appeal was given to the party aggrieved to the town sessions against every such rate; and a further appeal, if required, to the county sessions. An appeal against four rates being entered at the *January* town sessions, four grounds of appeal were specified in the notice: the party being dissatisfied made a further appeal to the county sessions, and two other grounds of appeal were added; the fourth being that the party was rated in respect of his lands in a higher proportion than all the other inhabitants mentioned in the rate: Held, first, that one appeal against the four rates was sufficient.

Secondly, that it was not necessary to give notice of appeal to all the inhabitants named in the rate.

And, thirdly, that the appellants must, at the county sessions, be confined to the original grounds of appeal at the town sessions. *The King v. The Justices of Suffolk*, T. 58 G. 3. 640

APPEAL OF DEATH.

In an appeal of death, appellee waged his battle. Held, that the counterplea to oust him of this mode of trial, must disclose such violent and strong presumptions of guilt, as to leave no possible doubt in the minds of the Court. And therefore a counterplea which only

only stated strong circumstances of suspicion, was held to be insufficient.

Held also, that the appellee may reply fresh matter tending to shew his innocence, as for instance an alibi, and his former acquittal of the same offence on an indictment.

But quære where the counter-plea is per se insufficient, or where the replication is a good answer to it, whether the Court should give judgment that the appellee be allowed his wager of battle or go without day. *Ashford v. Thornton*, E. 58 G. 3. Page 405

ASSUMPSIT.

1. Under a declaration containing only one set of counts, charging the defendant in his own right, the plaintiff may recover one demand due from the defendant individually, and another due from him as surviving partner. *Richards and Another v. Heather*, M. 58 G. 3. 29
2. Where a pauper residing in the parish of A., received during illness a weekly allowance from the parish of B. where he was settled: Held, that an apothecary, who had attended the pauper, may maintain an action for the amount of his bill against the overseer of B., who expressly promised to pay the same. *Wing v. Mill*, M. 58 G. 3. 104

AWARD.

1. Upon the trial of an action of tort, a verdict was found for the plaintiff, subject to a reference of all matters in difference. The defendant claimed before the arbitrator a sum of money due to him upon the balance of an account, which was admitted by the plaintiff to be due. The award, without

stating that it was made of and concerning the premises, directed a verdict to be entered for the plaintiff, with damages: Held, that this award was sufficient. *Gray v. Gwennap*, M. 58 G. 3. Page 106

2. Where by an order of reference, the costs of the cause were to abide the event, and the costs of the reference and of the special jury were left in the discretion of the arbitrator: Held, that he cannot after directing a verdict for the plaintiff award also that the latter should pay the costs of the special jury, which had been obtained on the motion of the defendant. *Finlayson v. McLeod*, T. 58 G. 3. 663

BAIL.

1. The defendant having put in and perfected bail, a ca. sa. was lodged and returned non est inventus, and proceedings being had against the bail, they rendered the principal in time: the defendant was then bailed again and discharged: Held, that proceedings could not be had against the last bail without taking out a fresh ca. sa. *Thackray v. Harris*, M. 58 G. 3. 212
2. Where the defendant in an action has become bankrupt, and obtained his certificate, after which proceedings are taken against the bail; the Court will, on motion, relieve them, and will not direct an issue to try the fact of the bankrupt's being a trader, the certificate, by the 5 G. 2. c. 30. s. 7 and 13., being made sufficient evidence of the trading, &c.
But no exoneratur having been entered on the bail-piece, such relief was granted only on payment of costs. *Harmer v. Hagger*, H. 58 G. 3. 332

BAILEE,

BAILEE.

See ACTION ON THE CASE, 1.

BANKRUPT.

1. The clause in the 12th sect. of stat. 5 G. 2. c. 30. depriving bankrupt of all benefit from his certificate, in the case of losses at play, is to be considered as a qualification, restraining the operation of the 7th section, which makes the certificate a bar; and evidence of such loss may be given in a court of law on the similitur to the general plea of bankruptcy. *Hughes v. Morley*, M. 58 G. 3. Page 22
2. Two parcels of goods were sold at different times, and paid for by bills; the vendee afterwards becoming bankrupt, the vendors proved under the commission, for the amount of the first parcel, they then holding the bill given in payment for the same; the bill for the other parcel having been negotiated by them prior to the bankruptcy, and being then outstanding, was afterwards dishonoured: Held, that the vendors were not precluded by the stat. 49 G. 3. c. 121. s. 14. from suing the bankrupt for the amount of the last parcel of goods. *Watson and Another v. Medex*, M. 58 G. 3. 121
3. When the assignees of a bankrupt enter upon and take possession of his leasehold property, they become chargeable with the covenants in the lease, although the bankrupt's effects were upon those premises, and the assignees delivered up the keys immediately after the effects were sold. *Hanson v. Stevenson*, H. 58 G. 3. 303
4. A bankrupt having escaped out of the custody of the marshal, and being at large, surrenders to a commission subsequently issued, and receives the protection conferred by 5 G. 2. c. 30. s. 5.: Held, that he may notwithstanding be retaken and detained in custody by the marshal. *Andersen v. Hampton*, H. 58 G. 3. Page 308
5. Where the defendant in an action has become bankrupt, and obtained his certificate, after which proceedings are taken against the bail, the Court will, on motion, relieve them, and will not direct an issue to try the fact of the bankrupt's being a trader, the certificate, by the 5 G. 2. c. 30. s. 7 and 13., being made sufficient evidence of the trading, &c.
But no exoneratur having been entered on the bail-piece, such relief was granted only on payment of costs. *Harmer v. Hagger*, H. 58 G. 3. 332
6. The stat. 39 & 40 G. 3. c. 104. extends to assignees of a bankrupt; and therefore where a plaintiff as assignee recovered less than 5*l*., the Court ordered a suggestion to be entered on the record to deprive the plaintiff of costs; but the defendant having given notice of his intention to dispute the petitioning creditor's debt, &c. (which was proved at the trial,) it was holden that the plaintiff was entitled to the costs thereby occasioned; and the Court ordered the suggestion to be entered accordingly. *Ward v. Abrahams*, H. 58 G. 3. 367
7. A sale of the property of a bankrupt, after an act of bankruptcy, but more than two months before the commission issued, is, since the 46 G. 3. c. 101. s. 1., a sale by the bankrupt, and not by the assignee; and a creditor of the bankrupt having become a purchaser, was holden (in an action brought by the assignee for the value of the goods) to be entitled to set off against such claim the debt due to him

- him from the bankrupt; this constituting a mutual credit between the bankrupt and such creditor within the meaning of the 46 G. 3. c. 101. s. 3. *Southwood v. Taylor*, E. 58 G. 3. Page 471
8. The obligee in a bastardy bond, after the bond had been forfeited, became bankrupt, and obtained his certificate: Held, that the parish officers were not thereby precluded from recovering upon the bond further expences incurred subsequently to the bankruptcy. *The Overseers of St. Martin-in-the-Fields v. Warren*, E. 58 G. 3. 491
9. Where a warrant of commitment by commissioners of bankrupts, after setting out the issuing of the commission, the adjudication of bankruptcy, &c., stated as the ground of commitment, that the bankrupt being brought before them, and they having proposed to administer an oath to him, he refused to be sworn, or to give an account of his property: Held, that such warrant was legal, and that it is not necessary in it to set out any specific question in such case; for this is a refusal to answer all possible questions which can be suggested.

Held also, that after the issuing of the writ of habeas corpus, and before the return to it, the commissioners may, if necessary, make a fresh warrant stating more fully the cause for detaining the bankrupt in custody, and that such warrant may by words of reference incorporate the formal parts of the first warrant.

Held also, that if both warrants are defective in form, the Court will, if a substantial cause of commitment appear, re-commit the bankrupt ex-officio.

Held also, that a commitment by a justice of the peace, under 5 G. 2. c. 30. s. 14. of the bank-

rupt, "until he shall be discharged by due course of law," is bad. *Ex parte Page*, E. 58 G. 3. Page 505.

10. The general assignment of a bankrupt's personal estate under his commission, does not vest a term of years in the assignees, unless they do some act to manifest their assent to the assignment as it regards the term, and their acceptance of the estate, rents, &c. And, therefore, till some act of this sort is done by them, the term still remains in the bankrupt, and he is liable to the payment of rent accruing due subsequent to the the bankruptcy. *Copeland v. Stephens*, T. 58 G. 3. 599

BARON AND FEME.

1. A married woman, arrested on mesne process, is entitled to be discharged out of custody on filing common bail, although her husband had absconded, and the debt had been incurred by her while a feme sole. *Crookes and Others v. Fry and Lavinia his Wife*, M. 58 G. 3. 165
2. Where a bill of exchange was payable to a feme sole, who intermarried before the same was due, it was holden, that the husband might sue in his own name, without joining the wife, although the latter had not indorsed the bill. *M'Neillage v. Holloway*, H. 58 G. 3. 218

BAWDY-HOUSE.

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BILLS OF EXCHANGE.

1. Where a bill of exchange was payable to a feme sole, who intermarried

termarried before the same was due, it was holden that the husband might sue in his own name, without joining the wife, although the latter had not indorsed the bill. *M'Neilage v. Holloway, H. 58 G. 3.* Page 218

2. Declaration stated a bill of exchange to be drawn upon and accepted by three persons; it was proved to have been drawn upon and accepted by the three jointly with a fourth: Held, that this was no variance. *Mountstephen v. Brooke, H. 58 G. 3.* 224
3. Where a bill of exchange being presented and left for acceptance, was refused acceptance by the defendant, but remained afterwards for a considerable space of time in his hands, and was ultimately destroyed by him: Held by three justices, dissentiente Lord *Ellenborough C. J.*, that the defendant was not thereby liable as acceptor of the bill. *Jeune v. Ward, T. 58 G. 3.* 653

BOND.

Bond, conditioned for the payment of a principal sum in the year 1820, with interest in the mean time half-yearly: an action having been brought for the penalty upon a breach of the condition in non-payment of half-a-year's interest on the 29th of *September* 1817, the Court refused to stay the proceedings before judgment on payment of the interest due and costs, although the non-payment of the interest was owing to a slip. *Van Sandau v. —, one, &c. M. 58 G. 3.* 214

BRIDGES.

See CLERK OF THE PEACE.

CARRIER.

See POST-OFFICE.

CHANCEL.

A grant of part of the chancel of a church by a lay impropriator to A., his heirs and assigns, is not valid in law. And therefore such grantee, or those claiming under him, cannot maintain trespass for pulling down his or their pews, there erected. *Clifford v. Wicks, E. 58 G. 3.* Page 498

CHURCHWARDEN.

See CUSTOM.

CLERK OF THE PEACE.

The sessions are not authorized to order the payment by the bridge-master to the clerk of the peace of a per centage on all money raised for the repair of bridges in a particular district, in lieu of all his fees for indictments, presentments, &c. for bridges within it; although such per centage was claimed as an ancient fee, and had been paid without dispute for a long period of time. *The King v. Houldgrace, H. 58 G. 3.* 312

COMPOSITION-DEED.

1. The creditors of an insolvent agreed, by an instrument (not under seal), that they would accept in full satisfaction of their debts twelve shillings in the pound, payable by instalments; and would release him from all demands; one of the creditors, who signed for the whole amount of his debt, held at the time, as a security for part, a bill of exchange drawn by the debtor, and accepted by a third person; the money due on this bill having afterwards been paid by the acceptor, it was holden that the creditor might retain it, the agreement of composition not containing any stipulation

lation for giving up securities, and the effect of it not being to extinguish the original debt. *Thomas and Another v. Courtney*, M. 58 G. 3. Page 1

2. A. being insolvent, by agreement stipulated to assign his property immediately, the creditors consenting that the business should be carried on for their benefit until the next *Michaelmas*, and that then the property should be divided among them; the insolvent assigned his effects; at the next *Michaelmas* several of the creditors who had signed this instrument agreed that the business should be carried on by the trustees for a further time: Held, that a creditor who had signed the first agreement, but who had not in any way concurred in the second, could not maintain an action against the insolvent for a debt existing at the time of the first agreement. *Cork v. Saunders*, M. 58 G. 3. 46

3. Where a creditor signs, seals, and delivers a composition-deed, although he does not set the amount of his debt opposite to his name in the deed, yet he is bound by the terms of the composition to the amount of his then existing debt. *Harry v. Wall, Widow*. M. 58 G. 3. 103

COMPOUNDING OFFENCES.

See PENAL STATUTE, 1.

CONSTABLE, ACTION AGAINST.

Where a constable, having a magistrate's warrant of distress to levy a church-rate, under the stat. 53 G. 3. c. 127., broke the door of and entered plaintiff's dwelling-house: Held, that although he thereby exceeded his authority, yet that no action could be maintained after the expiration of three
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calendar months. *Theobald v. Crichmore*, H. 58 G. 3. Page 227

CONVICTION.

The exception in 12 G. 3. c. 61. s. 11 of mills then used for making gun-powder, &c. does not apply to the limits first mentioned in that clause, but only "to the other part of Great Britain" not within those limits; and therefore an information charging the keeping of more than the allowed quantity of gun-powder within the specified limits, need not negative this exception. *The King v. Matters*, H. 58 G. 3. 362

COPYRIGHT.

An author, whose works had been published more than 28 years before the passing of the 54 G. 3. c. 156., is not entitled to the copyright for life. *Brooke v. Clarke*, H. 58 G. 3. 396

CORONER, PUBLISHING EVIDENCE BEFORE.

See LIBEL.

CORPORATION.

See VARIANCE, 5.

COSTS.

1. Where the plaintiff, after issue joined, has been convicted of felony, and received sentence of transportation, the Court will compel him or his attorney to give security for costs retrospective and prospective. *Harvey v. Jacob*, M. 58 G. 3. 159
2. Where an executrix pleaded, 1st, Non-assumpsit; 2d, Ne unques executrix; and, 3d, Plene administravit; and issues on the first pleas were found for plaintiff, and on the last for the defendant; it was holden that the last plea being a
3 C complete

complete answer to the action, the defendant was entitled to the general costs of the trial. *Edwards v. Bethel*, H. 58 G.3. Page 254

3. The Court will compel security for costs where plaintiff resides abroad, without a previous application to his attorney; but they will not order a stay of proceedings unless such application has been made. *Baile v. Bernales*, H. 58 G.3. 331

4. Where plaintiff sued as executor, and was nonsuited upon evidence being given at the trial that the supposed testator was still alive, the Court refused to allow costs to the defendant, it appearing from affidavits on both sides to be still at least doubtful whether the supposed testator were living or not. *Zachariah v. Page*, H. 58 G.3. 386

5. When, upon setting aside a verdict for plaintiff, the costs are directed to abide the event, and then the plaintiff discontinues the action; the defendant is not entitled to the costs of the trial. *Howarth v. Samuel*, E. 58 G.3. 566

6. The statute 11 G.2. c.19. s.22. gives double costs against a plaintiff in replevin only in three cases, viz. where he is nonsuit; discontinues his action; or has judgment given against him. And, therefore, where in replevin, the cause not being then at issue, the parties agreed by bond to submit the question to arbitration, the costs to abide the event, and the arbitrator afterwards awarded in favour of defendant; it was held that he is not entitled to double costs under the statute. *Gurney v. Buller*, T. 58 G.3. 670

COURT OF CONSCIENCE.

See BANKRUPT, 6. PRACTICE, 15.

DEVISE.

COVENANT.

1. Upon a covenant to repair and keep in repair during the continuance of the term, an action may be maintained for breaches committed before the term has expired. *Luxmoore v. Robson*, E. 58 G.3. Page 584
2. The selling of raw meat by retail, was holden in an action of ejectment to be a breach of a covenant in a lease, that the lessee should not exercise the trade of a butcher upon the premises, although no beasts were there slaughtered. *Doe dem. Gaskell v. Spry*, T. 58 G.3. 617

CRIMINAL INFORMATION.

See LIBEL.

CUSTOM.

1. A custom for the churchwardens of a parish to set up monuments, &c. in a church, without either the consent of the rector or ordinary, is illegal. *Beckwith v. Harding*, E. 58 G.3. 508
2. Where a parish contained within itself a borough not co-extensive with it, and the mayor of the borough, on a return to a mandamus for allowing a poor rate made by the churchwardens and overseers of the whole parish, stated a custom which had existed since the 43 Eds. of appointing separate churchwardens and overseers, and of making separate rates for the borough, and for those parts of the parish which lay without the borough; it was holden that such custom was invalid, and the return was quashed accordingly. *The King v. Gordon*, E. 58 G.3. 594

DEVISE.

1. A. devised all his hereditaments to his sister E. T. and to her daughters A. S. and F. T., their heirs

heirs and assigns, equally to be divided between them as tenants in common, for and during the life of *E. T.*; and after her death, he devised the third part "so devised to his sister for her life as aforesaid," to *A. S.* and *F. T.* in fee: Held, that all the estate passed under this will, and that the daughters *A. S.* and *F. T.* took a fee in two thirds, with a remainder in fee in the other third part after the death of the mother. *Doe on the several demises of Wolfe and others v. Allcock, M.* 58 G. 3. Page 137

2. A testator devised a particular estate by name to *T. W.*, his heir at law, and then devised to *H. W.* all the residue of his lands, *to be kept in the name and family of the W.'s as long as can be*: Held, that *H. W.* took an estate of inheritance. *Doe v. Wood, E.* 58 G. 3. 518

3. Devise to the heir at law in fee, with an executory devise over in case he does not attain twenty-one years of age: Held, that this does not alter the quality of the estate, which he would otherwise have taken as heir; and that he therefore takes by descent, and not by purchase. *Doe v. Timins, E.* 58 G. 3. 530

4. Devise of all my *Briton Ferry* estate, and all the lands, &c. of which it consists; and then all my *P. L.* estate, which, as well as my *B. F.* estate, lies in the county of *G.*: Held, that the former devise was not confined to lands in the county of *G.*, but extended to all that was usually known by the name of the *B. F.* estate; although part of devisor's estate was situate in the parish of *B. F.* in the county of *G.* *Doe v. The Earl of Jersey, E.* 58 G. 3. 550

5. Devise to *M. H.*, her heirs, &c. for ever; and in case *M. H.* shall happen to die and leave no child

or children, then to *J. B.* and her heirs for ever, paying the sum of 1000*l.* to the executor or executors of *M. H.* or to such person as *M. H.* by her will shall appoint: Held, that the words "child or children" were here synonymous with "issue;" and that this was not the devise of an estate tail to *M. H.*, but of an estate in fee to *M. H.*, with a good executory devise over to *J. B.* in case *M. H.* died leaving no issue living at her death. *Doe dem. Smith and Jane his Wife v. Webber and Another, T.* 58 G. 3. Page 713

DISTRESS.

Action for use and occupation. Plea, that plaintiff before action, took and detained, as a distress for the rent, goods of value sufficient to satisfy the same: Held, on special demurrer, that this plea was bad, for not shewing that the rent was satisfied. *Lear v. Edmonds. M.* 58 G. 3. 157

ELEGIT.

The sheriff's return to an elegit stated that he had delivered an equal moiety of a house: Held, that this return was void for not setting out the moiety by metes and bounds, and that the objection might be taken at nisi prius to an ejectment brought upon the elegit. *Fenny dem. Masters v. Durrant. M.* 58 G. 3. 40

ERROR, WRIT OF.

The 8 & 9 *W. 3. c. 11. s. 7.* applies to writs of error, &c.; therefore a writ of error does not abate by the death of one of several plaintiffs in error. *Clarke v. Rippon E.* 58 G. 3. 586

ESCAPE.

The sheriff having a writ against *G.*
3 C 2 B.

B. arrested *M. B.* who was the real debtor, and at the time of contracting the debt had represented himself as *G. B.*: Held that the sheriff having been informed of these circumstances while he had the real debtor in his custody, was not bound to detain him, and therefore that an action would not lie against him for an escape. *Morgans v. Bridges and Another*, T. 58 G. 3. Page 647

EVIDENCE.

1. In an action on a promissory note, the subscribing witness being dead, proof of his hand-writing, and that the defendant was present when the note was prepared, is sufficient without proving the hand-writing of the defendant: *Quære*, if proof of subscribing witness's hand-writing alone would have been sufficient. *Nelson v. Whittall*, M. 58 G. 3. 19
2. The clause in the 12th section of stat. 5 G. 2. c. 30. depriving bankrupt of all benefit from his certificate, in the case of losses at play, is to be considered as a qualification restraining the operation of the 7th section which makes the certificate a bar; and evidence of such loss may be given in a court of law on the similitur to the general plea of bankruptcy. *Hughes v. Morley*, M. 58 G. 3. 22
3. Under a declaration containing only one set of counts, charging the defendant in his own right, the plaintiff may recover one demand due from the defendant individually, and another due from him as surviving partner. *Richards v. Heather*, M. 58 G. 3. Page 29
4. On an issue to try whether the inhabitants of *A.* were immemorably bound to repair a chapel, the owner of the inheritance (having leased his property for years at a rent certain, without any deduction, and residing himself in a different county,) is not a competent witness to negative the liability, although he was not upon the rate, and the rate was in fact paid by his tenant; for such owner has an interest in discharging the inheritance from a permanent burden. *Rhodes v. Ainsworth*, M. 58 G. 3. Page 87
5. In an action for adultery, letters written by the wife to the husband (while living apart from each other) proved to have been written at the time they bore date, and when there was no reason to suspect collusion, are admissible evidence without shewing distinctly the cause of their living apart. *Trelawney v. Coleman*, M. 58 G. 3. 90
6. An indenture of apprenticeship made 1797, having been signed only by one overseer of the appellant-parish, the respondent-parish to shew that only one had been appointed that year, called upon the appellants to produce the original appointment, (having given them notice to produce all books and writings relating thereto,) one book only was produced, and that was not for the year 1797: Held that the respondents, not having taken any means to procure the testimony of the overseer himself, (who must be presumed to have the custody of the original appointment,) were not entitled to give secondary evidence of its contents. *The King v. The Inhabitants of Stoke Golding*, M. 58 G. 3. 173
7. Upon a plea of plene administravit, plaintiff in order to shew assets, gave in evidence a copy of a bill and answer, purporting to be an answer by a person of the same name, and sustaining the same character as the defendant: Held that the copy was admissible, and

and that on the face of it, there was presumptive evidence of identity; the defendant not having shewn any circumstances to rebut the presumption. *Hennell v. Charles Lyon, Administrator of Mary Lyon deceased*, M. 58 G. 3.

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8. Where a deed purported to grant all the coal-mines in the lands in the occupation of widow K. and son, and the grantor had not at that time any lands in the occupation of widow K. and son; and the deed was founded upon a contract of sale executed some months before, to which the grantor's land-steward was the subscribing witness: Held that, for the purpose of explaining the latent ambiguity in the deed, letters written by the latter to the grantees, respecting the sale to them by the grantor of the coal-mines in the deed, and purporting to be written by his directions, were admissible evidence without shewing an express authority from the grantor to write them. *Beaumont v. Field*, H. 58 G. 3. 247

9. An averment in a declaration that defendant's dogs were accustomed to worry and bite sheep and lambs, is not supported by proof that the dogs were of a ferocious and mischievous disposition, and that they had frequently attacked men. *Hartley v. Harri-man*, T. 58 G. 3. 620

Semble, however, that an averment that the dogs were of a ferocious and mischievous disposition would be sufficient in an action brought for an injury to plaintiff's sheep, without alleging specifically that they were accustomed to bite and worry sheep. 620

10. The defendant (in an action at the suit of the assignee of a bankrupt), had attended a meeting of the commissioners, and exhibited the account between him and the

bankrupt, and afterwards made a part-payment to the plaintiff on that account: Held, in an action for the balance remaining due, that this was *prima facie* evidence, as against the defendant, that the plaintiff was assignee, and that it was not necessary to produce the proceedings under the commission, the defendant not having given notice of his intention to dispute the bankruptcy. *Dickinson Assignee of Booth v. Coward*, T. 58 G. 3. Page 677

11. An averment (in a declaration for disturbing the plaintiff's right of common) that plaintiff was entitled to common of pasture for all his cattle *levant and couchant upon his land*, is well supported by evidence that the plaintiff was a part-owner with defendant and others of a common field, upon which, after the corn was reaped and the field cleared, the custom was for the different occupiers to turn out in common their cattle, the number being in proportion to the extent of their respective lands within the common field; although such cattle were not maintained upon such land during the winter; and although the custom proved was to turn out in proportion to the extent and not to the produce of the land, in respect of which the right was claimed.

Held also, that it was not necessary to state his right to be with the exception of his own land, but that it was well laid to be over the whole common. *Cheesman v. Hardham*, T. 58 G. 3.

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EXCISE.

See PENAL STATUTE, 2.

EXECUTOR.

1. Where an executrix pleaded 1st, Non-assumpsit; 2d, ne unques
3 C 3 execu-

executrix; and 3d, plene administravit; and issues on the first pleas were found for the plaintiff, and on the last for the defendant, it was holden, that the last plea, being a complete answer to the action, the defendant was entitled to the general costs of the trial. *Edwards v. Bethel*, H. 58 G. 3.

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2. Where plaintiff sued as executor, and was nonsuited upon evidence being given at the trial, that the supposed testator was still alive, the Court refused to allow costs to the defendant, it appearing from affidavits on both sides, to be still at least doubtful whether the supposed testator were living or not. *Zachariah v. Page*, H. 58 G. 3. 386
3. A. being indebted in his individual capacity to a house in trade, of which he himself was a partner, in a sum of money, the amount of which could not be exactly ascertained, covenants to pay the firm all his then debts, and such other debts as should subsequently accrue. A. dies without having satisfied the original debt, and having contracted further debts subsequent to the execution of the deed: Held, that his executors, two of whom were partners in the house of trade, could not plead either of these debts as an outstanding specialty debt, or by way of retainer. *De Tastet v. Shaw and Others*, T. 58 G. 3. 664

FINE.

If one of two tenants in common of a reversion levy a fine of the whole, such fine does not require an actual entry by the other tenant in common to avoid it. *Roe dem. Truscott v. Elliott*, M. 58 G. 3. 85

FRAUDS, STATUTE OF.

1. Where premises had been let to

B. for a term determinable by a notice to quit, and pending such term C. applies to A., the landlord, for leave to become the tenant instead of B., and upon A. consenting, agrees to stand in B.'s place, and offers to pay rent: Held, that (although B.'s term had not been determined by a notice to quit, or a surrender in writing) A. might maintain an action for use and occupation against C., and that the latter could not set up B.'s title in defence to that action. *Phipps v. Sculthorpe*, M. 58 G. 3. Page 50

2. Where a defendant, taken on a ca. sa., is discharged out of custody by consent of the plaintiff, the debt itself is extinguished; and therefore a promise by a third person to pay that debt on condition of that discharge is an original promise, and not within the 29 Car. 2. c. 3. s. 4.

Quære, Whether under the 29 C. 2. c. 3. s. 4., in order to charge a person with the debt of another, the consideration for the promise, as well as the promise itself, must be in writing? *Goodman v. Chase*, H. 58 G. 3. 297

3. Where a defendant, having entered into a guarantee in writing, and become liable upon it, at a period of more than six years before the commencement of the suit, verbally promised, within six years that the matter should be arranged, and afterwards, upon an action being brought, pleaded actio non accrevit, &c.; it was holden that the statute of frauds having been once satisfied by the original promise being in writing, it was not necessary, in order to take the case out of the statute of limitations, that the latter promise should also be in writing. *Gibbons and Others v. M'Casland, Executrix*, T. 58 G. 3. 690

4. A contract for a year's service to commence

commence at a subsequent day, being a contract not to be performed within the year, is within the 4th section of the statute of frauds, and must be in writing; and, therefore, no action can be maintained for the breach of a verbal contract made on the 27th May for a year's service to commence on the 30th June following. *Bracegirdle v. Heald*, T. 58 G. 3.

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FREIGHT.

The master of a ship has not a lien on the freight for his wages, or for his disbursements on account of the ship during the voyage, or for the premiums paid by him abroad for the purpose of procuring the cargo. *Smith v. Plummer*, T. 58 G. 3.

575

GAMEKEEPER.

A gamekeeper was authorized by his deputation to seize greyhounds, setting-dogs, ferrets, and to do all things belonging to the office of gamekeeper, according to the directions of the acts of parliament: Held, that he was not thereby authorized to seize hounds. *Grant v. Hulton and Others*, M. 58 G. 3.

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GRANT.

See CHANCEL.

GUARDIAN IN SOCAGE.

There cannot be a guardian in socage of an equitable estate; and, therefore, where a pauper married the widow of a man who had paid for and been let into possession of a freehold cottage, and had died leaving a daughter, but without having had any legal conveyance executed to him in his lifetime; it was holden that the pauper's residence in the cottage for forty days did not confer a settlement on him, the widow not being guardian in socage to the daughter.

Held also, that the Court will not take notice of doubtful equitable estates. *The King v. The Inhabitants of Toddington, E.* 58 G. 3. Page 560.

HAWKER AND PEDLAR.

A licensed hawker opening a room in a place, he not being a householder there, and that not being the usual place of his abode, and selling there by retail, does not thereby commit an offence within the statute 50 G. 3. c. 41. s. 7. To constitute such an offence the selling must be by outcry, &c. or some mode of sale at auction. *Allen v. Sparkall*, M. 58 G. 3.

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HUNDRED, ACTION AGAINST.

See ACTION ON THE CASE, 2. 4.

ILLEGAL AGREEMENT.

Where A. agreed to sell to B. one third share of a ship, which was then to be employed on a joint adventure, in the exportation of military stores to South America, contrary to an order in council then in force: Held, that (the agreement being entire, and containing on the face of it an illegal stipulation,) it lay on the party seeking to enforce the same to shew that means had been used to obtain a licence, or that the illegal purpose had been abandoned, and that in failure thereof A. could not recover for the share of the ship. *Holland and Another v. Hall and Another*, M. 58 G. 3.

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ILLEGAL TRADE.

See INSURANCE.

INCLOSURE ACT.

Where commissioners, by an inclosure

sure act, were empowered (inter alia) to make roads and to defray the expence by a rate on the several proprietors, and they executed their award as to the allotments before the roads were completed or sufficient funds were raised for that purpose: Held, that they might afterwards make a rate to defray the expence of completing the roads. *Haggerston v. Dugmore and Others*, M. 58 G. 3. Page 82

INDICTMENT.

Where the defendant has been acquitted on an indictment for not repairing a road, the Court will not grant a new trial; yet they will, under very special circumstances, suspend the entry of judgment, so as to enable the parties to have the question reconsidered upon another indictment, without the prejudice of the former judgment. *The King v. The Inhabitants of Wandsworth*, M. 58 G. 3. 63

INSURANCE.

1. A ship was permitted by a licence to proceed from D. to L., and thence to B., there to load to the destination of the port from which she departed. The vessel proceeded on her voyage from D. to L. and from L. to B.: Held, that she was not protected by the licence on a further voyage from B. to L. *Everth and Another v. Tunno*, M. 58 G. 3. 142
2. The 45 G. 3. c. 34. only repeals the navigation acts as to foreign-built ships, and does not confer upon them (when navigating under its provisions with the king's licence) all the privileges of British-built ships; and therefore the former cannot trade to the western coast of America without a South Sea licence.

- Quare*, Whether 42 G. 3. c. 77. authorizes British-built ships so to trade without such licence. *Dunlop v. Gill*, H. 58 G. 3. Page 334
3. Where a ship had sailed from *Elsineur* on her voyage home six hours before the owner, who followed in another vessel on the same day, and having met with rough weather in his passage, arrived first, and then caused an insurance to be effected on his own ship: Held, that these circumstances were material to be communicated to the underwriter, and that it was not sufficient to state merely that the ship insured was "all well at E. on the 26th July," the day of her sailing. *Kirby v. Smith*, T. 58 G. 3. 672

JUSTICES.

The 37 G. 3. c. 143. s. 1., by which the justices at their respective petty sessions within the divisions, districts and other places of the several counties of England, are authorized to appoint examiners of weight and balances, extends only to such divisions, &c. as were known and recognized at the time when the act passed; and therefore such appointment made at a petty sessions, by two justices for a district which they had, without the consent of the other magistrates, created within the last five or six years, was held to be illegal. *The King v. The Justices of Devon*, E. 58 G. 3. 588

LANDLORD AND TENANT.

See USE AND OCCUPATION. LIMITATIONS, STATUTE OF, 3.

Where a tenant ceased to reside on the premises for several months, and left them without any furniture, or sufficient other property to answer the year's rent: Held that the landlord might properly proceed

proceed under 11 G.2. c.19. s.16. to recover the possession, although he knew where the tenant then was, and although the justices found a servant of the tenant on the premises when they first went to view the same.

Held also, that it is not necessary to state, in the record of the magistrate's proceedings, that the landlord had a right of re-entry, although such a right must exist in order to entitle the party to proceed under this statute. *Ex parte Pilton*, H. 58 G.3. Page 369

LEVANT AND COUCHANT.

See EVIDENCE, 11.

LIBEL.

The Court will grant a criminal information for publishing in a newspaper, a statement of the evidence given before a coroner's jury, accompanied with comments, although the statement be correct, and the party has no malicious motive in the publication. *The King v. Fleet*, H. 58 G.3. 379

LICENCE TO TRADE.

See INSURANCE.

LIEN.

The master of a ship has not a lien on the freight for his wages, or for his disbursements on account of the ship during the voyage, or for the premiums paid by him abroad for the purpose of procuring the cargo. *Smith v. Plummer*, E. 58 G.3. 575

LIMITATIONS, STATUTE OF.

1. Trespass for breaking and entering coal-mines and taking away coals. Plea, *actio non accrevit infra sex annos*. To which the plaintiff replied in the affirmative. At the trial no evidence was given

to shew that the trespass was actually committed within six years: Held, that evidence of a promise to make compensation, made by defendant before the commencement of the action, and when he was threatened with an action for taking away coals, was not sufficient to support this issue; by which the plaintiff was bound to prove the affirmative, that he had a good cause of action within six years *before the commencement of the suit*. *Hurst v. Parker*, M. 58 G.3. Page 92

2. One of two joint-drawers of a bill of exchange becomes bankrupt, and under his commission, the indorsees prove a debt (beyond the amount of the bill) for goods sold, &c., and they exhibit the bill as a security they then held for their debt, and afterwards receive a dividend: Held, in an action by the indorsees of the bill against the solvent partner, that the statute of limitations was a good defence, although the dividend had been paid by the assignees of the bankrupt partner within six years. *Brandram and Others v. Wharton*, E. 58 G.3. 463

3. The statute of limitations is a good defence to an action by a landlord for rent against one who had once been his tenant from year to year, but who had not within the last six years occupied the premises, paid rent, or done any act from which a tenancy could be inferred, although the tenancy had not been determined by a notice to quit. *Leigh v. Thornton*, T. 58 G.3. 625

4. Defendant having entered into a guarantee in writing, and become liable upon it, at a period of more than six years before the commencement of the suit, verbally promised within six years, that the matter should be arranged, and afterwards upon an action being brought,

brought, pleaded *actio non accrevit*, &c.: Held, that the statute of frauds having been once satisfied by the original promise being in writing, it was not necessary, in order to take the case out of the statute of limitations, that the latter promise should also be in writing. *Gibbons and Others v. M^cCasland Executrix*, T. 58 G. 3. Page 690

MANDAMUS.

Where an order of removal was served on the appellant parish on *Saturday*, and the sessions were holden on the following *Tuesday*, and the appellant parish was thirty-seven miles from the place where the sessions were holden, but there was no appeal to those sessions, and the justices refused to receive the appeal at the next sessions, the Court granted a mandamus. *The King v. The Justices of Essex*, M. 58 G. 3. 210

MARKET.

King Charles the Second, by charter granted to the corporation of *Walsall* two fairs, to be holden annually, within the borough and foreign, and confirmed to them all markets which they then held, with a reservation of the rights of the lord of the manor; it appeared that a market had been holden immemorially in the High-street of *Walsall* until a very late period, when the corporation, finding it inconvenient, removed it out of the High-street to another and more convenient place within the borough; the corporation had exercised acts of ownership in pulling down an old market-house and erecting a new one; the clerk of the markets, however, had been appointed by the lord of the manor, but he did not receive any toll from the persons frequenting it. The de-

fendant having been indicted for a nuisance in erecting stalls in the High-street, after the removal of the market, the Judge, upon the trial, left it to the jury to say, whether the corporation were owners of this market; adding, that if they were, the right of removal was incident to the grant. The jury having found in the affirmative, the Court refused to grant a new trial. *The King v. Cotterill*, M. 58 G. 3. Page 67

NOTICE OF ACTION.

See TAX COLLECTOR.

OVERSEER.

See VARIANCE. ASSUMPSIT.

PARTNER.

Under a declaration containing only one set of counts, charging the defendant in his own right, the plaintiff may recover one demand due from the defendant individually and another due from him as surviving partner. *Richards v. Heather*, M. 58 G. 3. 29

PENAL STATUTE.

1. The statute 18 *Eliz. c. 5.* which prohibits the compounding of any offence upon colour or pretence of process, or without process, upon colour of any offence against any penal law, does not apply to offences cognizable only before magistrates; and an indictment for compounding such an offence was holden bad in arrest of judgment. *The King v. Crisp*, H. 58 G. 3. 282
2. The setting up of a private still without entry at the excise, or licence, is an offence subject to the penalty of 20*l.* only, and not 200*l.*; and therefore a conviction for such an offence in the latter penalty was quashed. *The King v. Bond*, H. 58 G. 3. 390

3. In

3. In an action founded upon the 25 G. 2. c. 36. by one of the two inhabitants, who had given information, &c. to the parish constable of *A. B.* keeping a bawdy-house, in consequence of which *A. B.* was prosecuted to conviction, it is necessary, (in order to entitle the plaintiff upon such conviction to recover the reward of 10*l.* from the overseers,) that the prosecution should have been conducted by the parish constable, and therefore, where the two inhabitants had taken upon themselves to conduct it, it was holden that they were not entitled to the reward, and that a demand upon the overseer stating the prosecution so to have been carried on was insufficient to entitle them to an action for the double penalty given by the act in case of a neglect or refusal by the overseer to pay such sum of 10*l.* upon demand. *Clarke v. Rice T. 58 G. 3.*

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PEW.

See CHANCEL.

PLEADING.

See APPEAL OF DEATH.

1. Under a declaration containing only one set of counts, charging the defendant in his own right, the plaintiff may recover one demand due from the defendant individually, and another due from him as surviving partner. *Richards v. Heather, M. 58 G. 3.* Page 29
2. Declaration by *B.*, a treasurer of a friendly society, on a bond to *A.*, then being treasurer. Plea, non est factum; the bond given in evidence was to *A.*, without stating him to be treasurer to the society: Held that *B.* was entitled to recover. *Cartridge v. Griffiths, M. 58 G. 3.* 57
3. Trespass for breaking and entering coal-mines, and taking away coals.

Plea, *actio non accrevit infra sex annos*; to which the plaintiff replied in the affirmative. At the trial no evidence was given to shew that the trespass was actually committed within six years. Held that evidence of a promise to make compensation, made by defendant before the commencement of the action, and when he was threatened with an action for taking away coals, was not sufficient to support this issue; by which the plaintiff was bound to prove the affirmative, that he had a good cause of action within six years before the commencement of the suit. *Hurst v. Parker, M. 58 G. 3.*

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4. Where an act of parliament in the enacting clause, creates an offence and gives a penalty, and in the same section there follows a proviso, containing an exemption which is not incorporated with the enacting clause by any words of reference, it is not necessary for the plaintiff, in suing for the penalty, to negative such proviso in his declaration. *Steel v. Smith, M. 58 G. 3.* 94
5. A recognizance is not a record until it is enrolled; and therefore, where defendant pleaded to assumpsit on bills of exchange, &c. that the plaintiff was indebted to him by virtue of a recognizance taken in the court of Exchequer, which was still in force, as by the said recognizance remaining in the said court before the barons will appear, without stating that it was enrolled: A replication, that the plaintiff was not so indebted, concluding to the country, was held good, on special demurrer, inasmuch as the plea did not state a debt due by recognizance, which was matter of record. *Glyn, Bart. and Others v. Thorpe, M. 58 G. 3.* 153
6. Action for use and occupation. Plea, that plaintiff, before action, took and detained, as a distress for

for the rent, goods of value sufficient to satisfy the same: Held, on special demurrer, that this plea was bad, for not shewing that the rent was satisfied. *Lear v. Edmonds*, M. 58 G. 3. Page 157

7. Proceedings by bill, concluding with a prayer of judgment of the writ, and declaration founded thereon: Held, bad upon special demurrer. *Attwood v. Davis*, M. 58 G. 3. 172

8. Indictment against the inhabitants of a parish for not repairing a road. Plea, that the inhabitants of a particular district within the parish have immemorially repaired all the roads within that district, of which the road indicted was one: Held that this plea was good, although it did not state any consideration for the liability of the inhabitants of the district. *The King v. The Inhabitants of Ecclesfield*, H. 58 G. 3. 348

9. The exception in 12 G. 3. c. 61. s. 11. of mills or other places then used for making gun-powder, &c. does not apply to the limits first mentioned in that clause; but only "to the other part of Great Britain," not within those limits; and, therefore, an information charging the keeping of more than the allowed quantity of gun-powder within the specified limits need not negative this exception. *The King v. Matters*, H. 58 G. 3. 362

10. A bailable writ is not necessarily a special writ within the 51 G. 3. c. 124.; and, therefore, a plea stating that plaintiff commenced his action by a bailable writ indorsed for bail for 60*l.*, by virtue of which defendant was arrested; and that plaintiff's then cause of action did not amount to 15*l.*, or to any sum for which defendant was liable to be arrested; was held bad on general demurrer for not shewing the writ to be a special writ. *Ball v. Swan*, H. 58 G. 3. 393

11. An averment in a declaration

that defendant's dogs were accustomed to worry and bite sheep and lambs, is not supported by proof that the dogs were of a ferocious and mischievous disposition, and that they had frequently attacked men.

Semble, however, that an averment that the dogs were of a ferocious and mischievous disposition, would be sufficient in an action brought for an injury to plaintiff's sheep, without alleging specifically that they were accustomed to bite and worry sheep. *Hartley v. Harriman*, T. 58 G. 3. Page 620

POOR RATE.

See CUSTOM, 2.

1. The owners of a coasting vessel are liable to be rated in respect of the profits accruing therefrom, in that parish where they themselves reside, and where the ship is registered, her cargoes are usually received and delivered and her freight paid, and which is the home of the vessel when unemployed, although at the time of making the rate, the ship was not actually within the parish. But they are not liable to be rated for a ship which was never locally within the parish, although the profits be there received by the owners. *The King v. Richard Shepherd and Others*, M. 58 G. 3. 109
2. Where a statute empowered the proprietors of a canal to take rates in respect of vessels navigating the same, and expressly exempted such rates from the payment of taxes, rates, &c.; it was holden that the land occupied by the canal was also thereby exempted from poor's rate. *The King v. The Calder and Hebble Navigation Company*, H. 58 G. 3. 263
3. A canal act directed, that the company should be rated for all lands and buildings in the same pro-

proportion as other lands and buildings lying near the same, and as the same would be rateable if they were the property of individuals in their natural capacity; and a subsequent act directed all rates and assessments upon the personal estate of the company should be assessed in every parish in proportion to the length of the canal in such parish: Held, that the company were liable to be rated for their lands, &c. only at the same value as other adjacent lands, and not according to the improved value derived from the land being used for the purposes of the canal. *The King v The Grand Junction Canal Company*, H. 58 G. 3. Page 289

POST-OFFICE.

A parcel, containing bank-notes, stamps, and a letter, was sent by a common carrier from one stamp-distribution to another: Held, in an action against the carrier, that the circumstance of the letter accompanying the stamps was *prima facie* evidence that it related to them, so as to bring the case within the proviso of the 42 G. 3. c. 81. s. 6., which enacts, "That the prohibition to send letters otherwise than by the post shall not extend to letters sent by any common carrier with and for the purpose of being delivered with the goods that the letter concerns;" and that the defendant not having proved the letter to relate to any other subject-matter, was liable for the value of the parcel. *Bennett v. Clough and Another*, E. 58 G. 3. 461

POST-HORSE DUTY.

A coach and horses were hired at *Portsea* to take a party to the theatre at *Portsmouth*, and to bring back, and a specific sum was charged: Held, that this was a

letting to hire of horses by the stage, to be used in travelling, and liable to a duty of one-fourth of the amount charged, under 48 G. 3. c. 98. s. 8.

So, where a chaise and horses were hired to take a party out to dinner, and to bring back.

Mourning coaches hired to take up at a distant place, and to carry thence persons to the place of interment, for which a specific sum is charged, are liable to the same duty; and such coaches are not exempted by reason of carrying a corpse, if living persons go along with it in the carriage. *White v. Beazley*, M. 58 G. 3. Page 166

POWER.

A power of sale is reserved to three trustees and their heirs; one of the trustees dies, and the two surviving trustees execute the power: Held, that the power was not well executed; although the deed expressly provided that the money arising from the sale should be entrusted to the trustees for the time being, and although it also reserved a power, in case of death, &c. to appoint new trustees. *Townsend and Another v. Wilson*, T. 58 G. 3. 608

PRACTICE.

1. Where the defendant has been acquitted on an indictment for not repairing a road, the Court will not grant a new trial; yet they will, under very special circumstances, suspend the entry of judgment, so as to enable the parties to have the question reconsidered upon another indictment, without the prejudice of the former judgment. *The King v. The Inhabitants of Wandsworth*, M. 58 G. 3. 68
2. The defendant need not appear before he moves to reverse an out-lawry;

- lawry; and where he did not go or continue abroad for the purpose of avoiding process, the Court will on motion, reverse the outlawry, and order the recognizance to be taken in the alternative, and not for the payment of the condemnation money absolutely. *Graham and Another v. Alexander Henry and Others*, M. 58 G. 3. Page 131
3. Where the plaintiff, after issue joined, has been convicted of felony, and received sentence of transportation, the Court will compel him or his attorney to give security for costs retrospective and prospective. *Harvey v. Jacob*, M. 58 G. 3. 159
4. In a case where a general verdict was taken generally for the plaintiff, the Court refused an application for entering the verdict on particular counts according to the evidence on the Judge's notes, after a lapse of eight years, and after the judgment had been reversed in error for a defect in one count. *Harrison v. King*, M. 58 G. 3. 161
5. A married woman, arrested on mesne process, is entitled to be discharged out of custody on filing common bail, although her husband had absconded, and the debt had been incurred by her while a feme sole. *Crookes v. Fry and Lavinia his Wife*, M. 58 G. 3. 165
6. A person who has continued to practise as a solicitor after his certificate has expired, may under circumstances, be re-admitted without giving a term's notice. *Ex parte Dent*, M. 58 G. 3. 189
7. *Semble*, that a return by the sheriff to a bill of *Middlesex*, stating that he took and detained the defendant until he rescued himself, is sufficient, without naming the rescuers, or stating them to be people of the county.
But the return not stating the arrest to have taken place in the county was held to be bad. *The King v. The Sheriff of Middlesex in a Cause of Williams against Pennell*, M. 58 G. 3. Page 190
8. In striking a special jury, the coroner is not bound to take the jurors as they occur upon the sheriff's books, but is to make a selection; and where he had made such selection impartially, the Court refused to cancel the list of persons so selected. *The King v. Wooler*, M. 58 G. 3. 193
9. Where the Court think that a prisoner ought to be bailed for felony, if he be unable to defray the expence of being brought to *Westminster* for that purpose, they will grant a rule to shew cause why he should not be bailed by a magistrate in the country, with a certiorari to return the depositions before them. *The King v. Jones*, M. 58 G. 3. 209
10. The defendant having put in and perfected bail, a *ca. sa.* was lodged and returned *non est inventus*, and proceedings being had against the bail they rendered the principal in time; the defendant was then bailed again and discharged: Held that proceedings could not be had against the last bail without taking out a fresh *ca. sa.* *Thackeray v. Harris*, M. 58 G. 3. 212
11. Bond conditioned for the payment of a principal sum in the year 1820, with interest in the mean time half-yearly, an action having been brought for the penalty upon a breach of the condition, in non-payment of half a year's interest on the 29th September 1817. The Court refused to stay the proceedings before judgment on payment of the interest due and costs; although the non-payment of the interest was owing to a slip. *Van Sandau v. — one, &c.* M. 58 G. 3. Page 214
12. Where a legal objection is taken at

PRACTICE.

at the trial and overruled by the Judge without reserving the point, and the Court are afterwards of opinion that that objection was a good ground of nonsuit, they will grant a new trial only, and will not permit a nonsuit to be entered. *Minchin v. Clement*, H. 58 G.3.

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13. Where the plaintiff, having omitted to give due notice of trial, enters his record in the marshal's book, subsequent to the entry of the defendant's record by proviso upon which due notice of trial has been given; it was holden that the defendant had a right to go to trial on his record, and that the plaintiff not having then appeared, was properly nonsuited. *Brown v. Otley*, H. 58 G.3.

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14. The Court will compel security for costs where plaintiff resides abroad, without a previous application to his attorney; but they will not order a stay of proceedings unless such application has been made. *Baille v. Bernales*, H. 58 G.3.

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15. The statute 39 & 40 G.3. c. 104. extends to assignees of a bankrupt; and therefore where a plaintiff as assignee recovered less than 5*l.*, the Court ordered a suggestion to be entered on the record to deprive the plaintiff of costs; but defendant having given notice of his intention to dispute the petitioning creditor's debt, &c. (which was proved at the trial,) it was holden that the plaintiff was entitled to the costs thereby occasioned; and the Court ordered the suggestion to be entered accordingly. *Ward v. Abrahams*, H. 58 G.3.

367

16. Scire facias quashed by plaintiff before plea pleaded upon payment of costs only. *Pickman v. Robson*, E. 58 G.3.

Page 486

17. An intervening Sunday is not to be reckoned as one of the four

REMOVAL, ORDER OF. 751

days during which a ca. sa. must lie in the sheriff's office to charge the bail. *Howard v. Smith*, E. 58 G.3.

528

18. In entering up judgment on an old warrant of attorney, the affidavit may be properly entitled in a cause. *Sowerby v. Woodroff*, E. 58 G.3.

567

19. The 8 & 9 W. 3. c. 11. s. 7. applies to writs of error, and therefore a writ of error does not abate by the death of one of several plaintiffs in error. *Clarke v. Rippon*, E. 58 G.3.

586

20. Where defendant, a prisoner after the issuing of the writ of habeas corpus for bringing him up to be charged in execution, sues out and obtains the allowance of a writ of error, he cannot be charged in execution, but must be remanded to his former custody. *Stonehouse v. Ramsden*, T 58 G.3.

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PROMOTIONS, 217. 729.

PROPERTY-TAX.

An occupier of lands, during a course of twelve years, paid to the collector of taxes the landlord's property tax, and the full rent as it became due to the landlord, without claiming any deduction on account of the tax so paid: Held, that the occupier could not recover back from the landlord any part of the property tax so paid. *Denby v. Moore*, M. 58 G.3.

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REMOVAL, ORDER OF.

See MANDAMUS.

An order of magistrates was directed to the parish of *W.* in the county of *Rutland*, and also to the parish of *M.* in the county of *Leicester*, and the words "county of *Rutland*," were then written in the margin, and the magistrates were in a subsequent part of the order, described

described as justices of the peace for the county aforesaid: Held, that it thereby sufficiently appeared that they were justices for the county of Rutland. *The King v. The Inhabitants of St. Mary's Leicester*, H. 58 G. 3. Page 327

RECOGNIZANCE:

A recognizance is not a record until it is enrolled, and therefore where defendant pleaded to assumpsit on bills of exchange, &c. that the plaintiff was indebted to him by virtue of a recognizance taken in the Court of Exchequer, which was still in force, as by the said recognizance remaining in the said Court before the Barons will appear, without stating that it was enrolled: A replication, that the plaintiff was not so indebted, concluding to the country, was held good, on special demurrer, inasmuch as the plea did not state a debt due by recognizance, which was matter of record. *Glynn, Bart., and Others v. Thorpe, M.* 58 G. 3. 153.

RULE OF COURT, 723.

SALE.

A. by letter offers to sell to B. certain specified goods, receiving an answer by return of post; the letter being misdirected, the answer notifying the acceptance of the offer arrived (two days later than it ought to have done) on the day following that when it would have arrived if properly directed, A. having then sold the goods on the preceding day: Held, that there was a contract binding the parties, from the moment the offer was accepted, and that B. was entitled to recover against A. in an action for not completing

SETTLEMENT.

his contract. *Adams and Others v. Lindsell and Another*, T. 58 G. 3. Page 661

SESSIONS.

See MANDAMUS.

SETTLEMENT—by Apprenticeship.

1. The master of several apprentices, upon his quitting business, proposed to assign all his apprentices without mentioning either their names or number, to J. S. but no assignment was ever made; the pauper, one of the apprentices was afterwards hired by J. S. as a servant for fifty-one weeks; and her former master on meeting her, expressed his approbation of her having gone into the service of J. S.; the sessions having found that there was not a particular assent of the original master to the second service, and therefore the relation of master and apprentice never subsisted between J. S. and the pauper, this Court thought the sessions well warranted in that conclusion. *The King v. The Inhabitants of Ashley de la Zouch*, M. 58 G. 3. 116
2. An indenture stated that the overseers and churchwardens of M. in the county of Warwick, with the consent of justices of the said county, bound a pauper apprentice to T. W. of H., in the county of Leicester, and the justices in their written consent in the margin, described themselves as justices of the county aforesaid: Held, that it sufficiently appeared that they were justices of the county of Warwick. *The King v. The Inhabitants of Hinckley*, H. 58 G. 3. 273
3. The statute 43 Eliz. c. 2. does not require absolutely two churchwardens in every parish for the manage-

management of the poor; and therefore an indenture binding out a poor apprentice, by one churchwarden, (where by custom there was but one,) and one overseer, was held to be good within the 5th section of that statute, which requires it to be executed by the greater part of the churchwardens and overseers. *The King v. The Inhabitants of Earl Shilton*, H. 58 G. 3. Page 275

4. The premium given by the parish officers upon the binding out of a poor apprentice, need not be set out in the indenture in words at length; such an indenture being exempted from any duty by 8 Anne c. 9. s. 40., and the insertion of the premium being required for no other purpose but to ascertain the amount of the duty. *The King v. The Inhabitants of Oadley*, H. 58 G. 3. 477

SETTLEMENT—by Hiring and Service.

1. Where, by a parol contract, the master agreed to teach the pauper to make stockings during the year, for which he was to receive two guineas, and the pauper was to have his earnings, paying his master for the use of the frame, &c. and the pauper continued in the service a year and a half: It was holden, that the pauper did not gain a settlement by hiring and service. *The King v. The Inhabitants of Bilborough*, M. 58 G. 3. 115
2. A female natural child was hired for a year by the wife of its reputed father, and continued doing the household work for three years, but after the first year, no wages were paid, nor was there any new contract of hiring: Held, that the sessions were warranted in finding, that after that time she did not

continue on the terms of the original hiring. *The King v. The Inhabitants of Sow*, M. 58 G. 3. Page 178

3. A pauper, before the expiration of her apprenticeship, hired herself and served for a year, the four last months of which were after her indentures had expired, and then hired herself to the same person for another year, but served only ten months: Held, that the first service (although without the knowledge or consent of the master) might be coupled with the service of the last contract, and that the pauper thereby gained a settlement. *The King v. The Inhabitants of Dawlish*, H. 58 G. 3. 280
4. A service under a hiring for fifty-one weeks may be coupled with a service under a previous hiring for a year, so as to confer a settlement. *The King v. The Inhabitants of Fillongley*, H. 58 G. 3. 319
5. A clerk in a mercantile house hired by the year, but serving only during the usual hours of business, thereby gains a settlement, although those hours did not by the custom of the trade, ever occupy the whole day, and he went where he pleased, without asking his master's leave, when those hours were over. *The King v. The Inhabitants of All Saints Worcester*, H. 58 G. 3. 322
6. A pauper agreed to serve as a brickmaker from Michaelmas to Michaelmas, and to make 70,000 bricks at a stipulated price: Held, that this was not a contract for a year's service absolutely, but a contract to serve till the completion of the job; and therefore a settlement was not thereby gained. *The King v. The Inhabitants of Woodhurst*, H. 58 G. 3. 325

SETTLEMENT—by a Tenement of 10*l.* a year.

1. A soldier, whilst his regiment lay in barracks at B. took a house there for himself and family, of the yearly value of 10*l.*, and resided therein more than forty days: Held, that this was a coming to settle in a tenement, and that he thereby gained a settlement. *The King v. The Inhabitants of Brightelmston*, H. 58 G. 3. Page 270

2. A pauper employed as a labourer by the Board of Ordnance, having previously occupied a house at an annual rent of 7*l.*, which was then purchased by the Board, still continued to reside in part of the premises, at a weekly rent of 2*s.* which was deducted out of his wages, and during such last occupation he also occupied a shop (the shop and house together being of the annual value of 10*l.*) and upon his dismissal from his employment he gave up possession of the house as required: Held, that his last occupation of the house was not as a tenant, but as a servant, and that no settlement was thereby gained. *The King v. The Inhabitants of Cheshunt*, E. 58 G. 3. 473

3. A pauper by occupying a freehold estate of his own, and also other lands as tenant, the whole being of the aggregate annual value of 10*l.*, does not thereby gain a settlement, it being necessary under the 13 & 14 Car. 2. c. 12. that he should come to settle on all the property in the character of tenant. *The King v. The Inhabitants of St. John in Glastonbury*, E. 58 G. 3. 481

SHERIFF.

See ESCAPE. ELEGIT.

The sheriff under a fi. fa. seizes a lease and sells the term before the

writ is returnable, but does not execute the assignment to the vendee till a subsequent period: Held, that this was a valid assignment. *Doe dem. Stevens v. Denton*, H. 58 G. 3. Page 280

SLANDER.

An action for defamation will not lie against a barrister for words spoken by him as counsel in a cause pertinent to the matter in issue. *Hodgson v. Scarlett*, H. 58 G. 3. 232

SOUTH SEA COMPANY.

The 45 G. 3. c. 34. only repeals the navigation acts as to foreign-built ships, and does not confer upon them (when navigating under its provisions with the king's licence) all the privileges of British-built ships; and therefore the former cannot trade to the western coast of America without a South Sea licence.

Quere, Whether 42 G. 3. c. 77. authorizes British-built ships so to trade without such licence. *Dunlop v. Gill*, H. 58 G. 3. 334

SPECIAL JURY.

In striking a special jury, the coroner is not bound to take the jurors as they occur upon the sheriff's books, but is to make a selection; and where he had made such selection impartially, the Court refused to cancel the list of persons so selected. *The King v. Wooler*, M. 58 G. 3. 193

SHIP.

See FREIGHT. LIEN.

STAMP.

Where C. was directed by a letter from B. to pay out of the proceeds of his goods, then unsold, in his C.'s hands, a certain sum of money to D., which C. consented to do by letter

letter to *D.*, (which letter was stamped with an agreement-stamp), and these letters being given in evidence to prove that the money was paid by order of *B.*: It was held that they did not amount to an agreement between *B.* and *C.*, and, consequently, that the stamp was improper, and that the order itself for payment should have been stamped, as being an order for the payment of money out of a fund, which might or might not be available within the meaning of the statute 55 G. 3. c. 184. schedule, part 1. *Firbank and Another, Assignees of Mann, a Bankrupt, v. Bell and Another*, M. 58 G. 3.

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STATUTES.

Eliz.

18. Compounding of offences cognizable before magistrate. 282

Car. II.

29. c. 3. s. 4. 297. 723

Geo. III.

12. c. 61. s. 11. Gun-powder—Conviction. 362

40. c. 104. London Court of Conscience Act. 367

STILL, PRIVATE, — Setting up, liable to what penalty.

See PENAL STATUTE, 2.

TAX COLLECTOR.

Assumpsit for money had and received, brought to recover the amount of an excessive charge made by the defendants as collectors, on a distress for arrears of taxes: Held, that the defendants were not entitled to a month's notice before action brought, under stat. 43 G. 3. c. 92. s. 70, which provides that no writ or process shall be sued out for any thing done in pursuance of that

act, till after one month's notice. *Umphelby v. M'Lean and Another*, M. 58 G. 3. Page 42

TRESPASS.

See CHANCEL.

TRUSTEES.

See POWER.

USE AND OCCUPATION.

Where premises had been let to *B.* for a term determinable by a notice to quit, and pending such term *C.* applies to *A.*, the landlord, for leave to become the tenant instead of *B.*, and upon *A.* consenting, agrees to stand in *B.*'s place, and offers to pay rent: Held, that (though *B.*'s term had not been determined either by a notice to quit or a surrender in writing,) *A.* might maintain an action for use and occupation against *C.*, and that the latter could not set up *B.*'s title in defence to that action. *Phipps v. Sculthorpe*, M. 58 G. 3. 50

VARIANCE.

1. Where the contract declared upon was, that plaintiff had bargained and sold, and defendant agreed to buy a large quantity of head-matter and sperm oil, which was afterwards ascertained to be a given quantity, and the contract proved was, for the purchase of all the head-matter and sperm oil, per the *Wildman*: Held that this was no variance. *Wildman v. Glossop*, M. 58 G. 3. 9
2. Declaration by *B.* a treasurer of a friendly society, on a bond to *A.* then being treasurer; Plea, non est factum, the bond given in evidence was to *A.*, without stating him to be treasurer to the society: Held that *B.* was entitled to recover. *Cartridge v. Griffiths*, M. 58 G. 3. 57
3. Where the declaration alleged that

that the defendant was overseer of the township of S., and it was proved that he had acted as such, and there was no evidence of overseers having been appointed for the parish of S.: Held that although the appointment was produced, and purported to be an appointment of the defendant as overseer of the parish of S., this was no variance. *Steel v. Smith*, M. 58 G. 3. Page 94

4. Declaration stated that a bill of exchange to be drawn upon and accepted by three persons; it was proved to have been drawn upon and accepted by the three jointly with a fourth: Held that this was no variance. *Mountstephen v. Brooke*, H. 58 G. 3. 224

5. In ejectment the demise was laid to be by the mayor, burgesses, &c. of the borough town of M., and on the trial, it turned out from the charter that the name of the corporation was "the mayor, &c. of M.:" Held that this was no variance, it appearing from the charter which was in evidence that M. was a borough town. *Doe dem. Mayor, Aldermen, Capital Burgesses, and Commonalty of Malden v. Miller*, T. 58 G. 3. 699

VENDOR AND VENDEE.

1. A., a foreign merchant, employs B. to purchase goods on commission; the vendors (with the knowledge that the purchases were made on account of A.) make out the invoices to B., and take in payment his acceptances payable at six months: Held, 1st, that there was no contract of

sale as between A. and B.; and 2d, that if any such contract existed, that B. could maintain no action against A. before the six months expired. *Seymour v. Pychlas*, M. 58 G. 3. Page 14

2. A. by letter offers to sell to B. certain specified goods, receiving an answer by return of post; the letter being misdirected, the answer notifying the acceptance of the offer arrived (two days later than it ought to have done); on the day following that when it would have arrived if properly directed, A. having then sold the goods on the preceding day: Held, that there was a contract binding the parties, from the moment the offer was accepted, and that B. was entitled to recover against A. in an action for not completing his contract. *Adams and Others v. Lindsell and Another*, T. 58 G. 3. 681

WAGER.

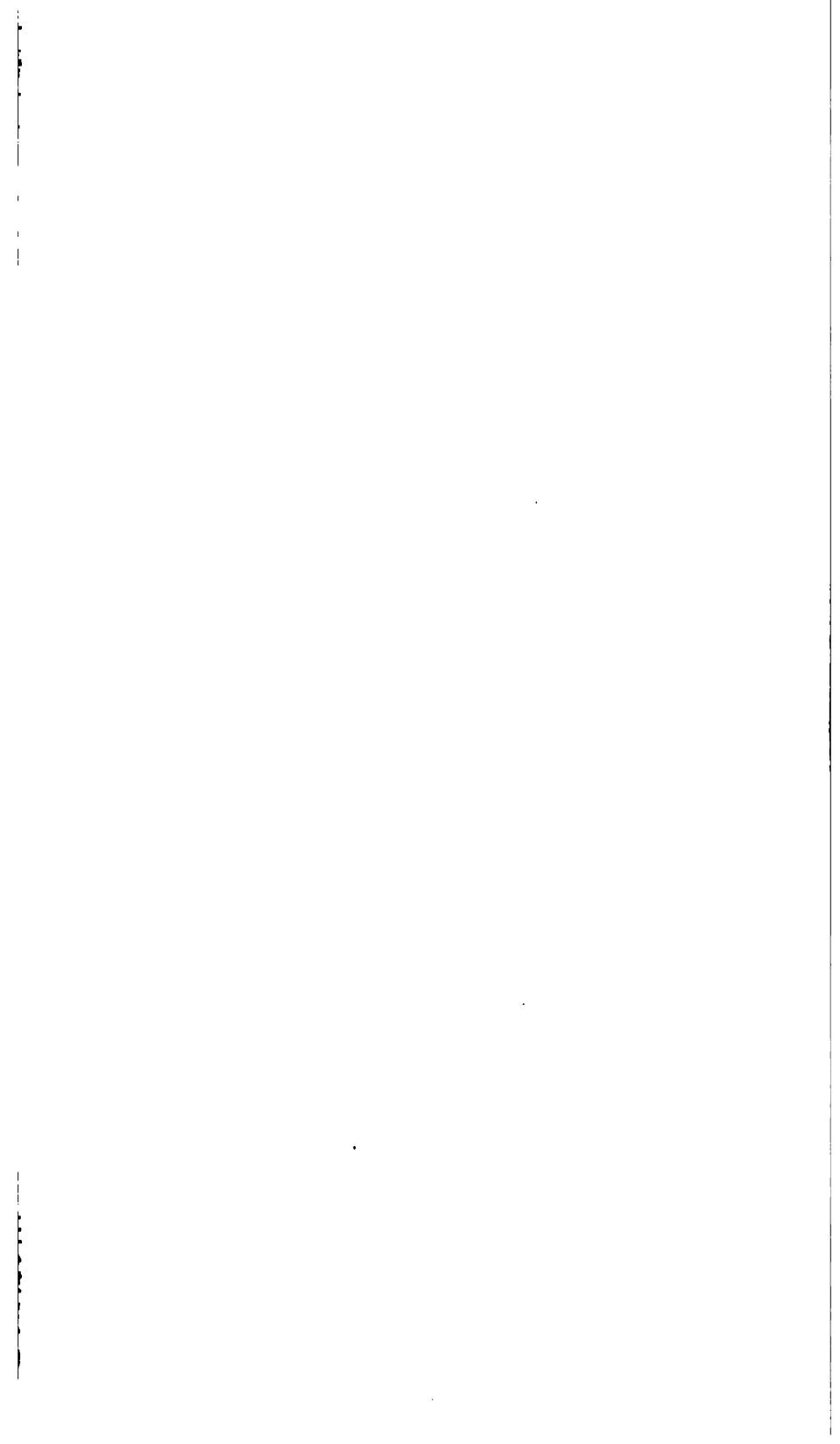
Semble, that a wager between the proprietors of two carriages for the conveyance of passengers for hire, that a given person should go by one of these carriages and no other, is illegal.

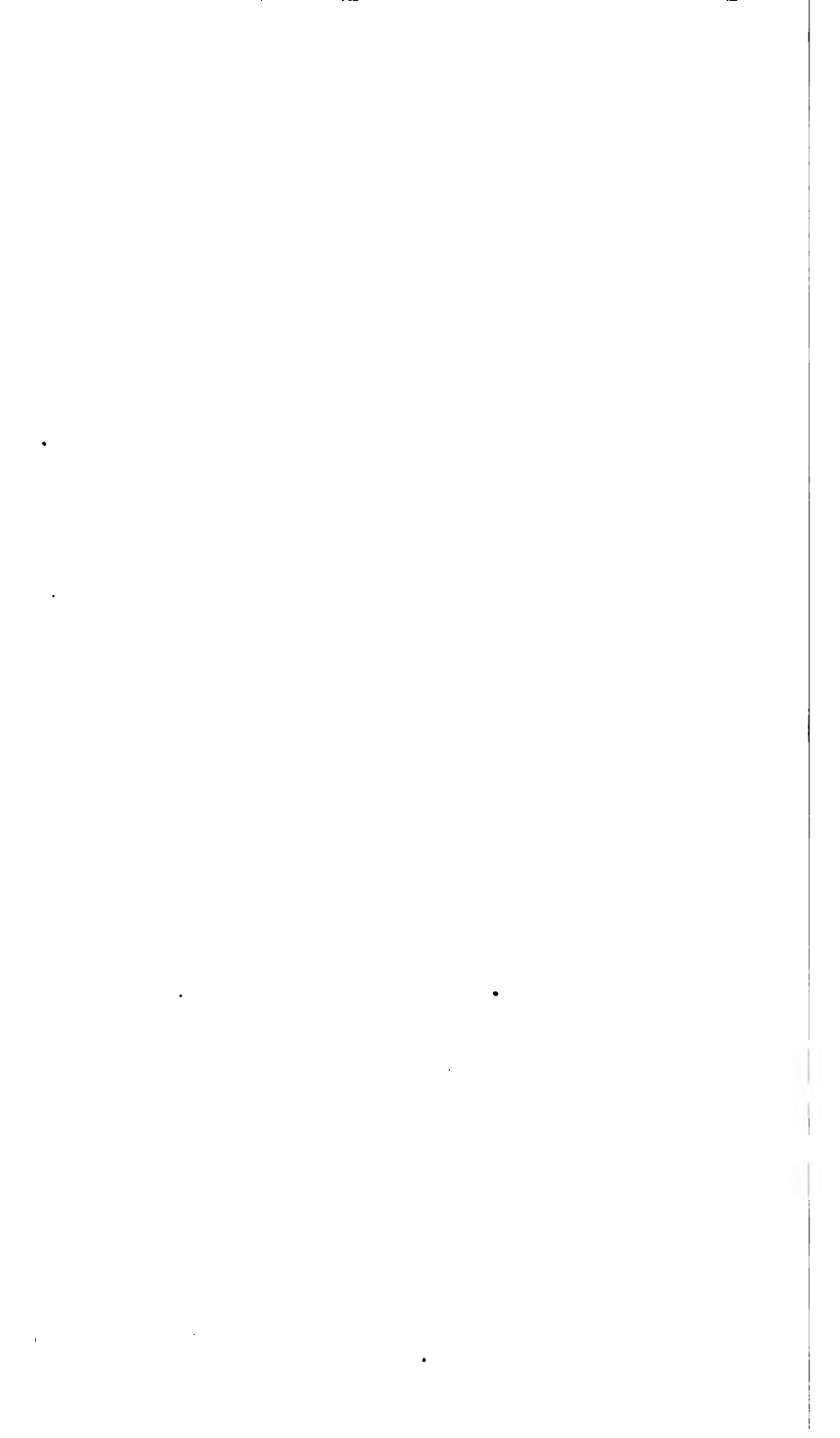
But held, at all events, (the wager having been deposited in the hands of the stake-holder,) that either party having demanded his deposit before the wager was won, was entitled to have it returned to him, and on refusal maintain an action against the stake-holder. *Eltham v. Kingsman*, T. 58 G. 3. 683

WITNESS.

See EVIDENCE, 4.

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